

Cour d'Appel

Montréal

En appel de deux jugements rendus le 26 juillet 1991 par
l'honorable [REDACTED] par
distribution [REDACTED]

Nos: [REDACTED]

LE PROCUREUR GÉNÉRAL DU CANADA
APPELANT-Intimé

c.

RJR-MacDONALD INC.
INTIMÉE-Requérante

-et-

LE PROCUREUR GÉNÉRAL DU CANADA
APPELANT-Intimé

c.

IMPERIAL TOBACCO LTD
INTIMÉE-Requérante

-et-

LE PROCUREUR GÉNÉRAL DU QUÉBEC
MIS EN CAUSE-Mis en cause

DOSSIER CONJOINT
Volume XVI: pages 2721 à 2872
(Dépositions)

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Le 31 octobre 1989

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MICHAEL WATERSON (Suite)

Contre-int. par

Vol. 16 - pp. 2255 à 2398

Me Baker

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CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

COUR SUPÉRIEURE

SENTENCE DE L'HONORABLE JUGE JEAN-JUDE CHABOT, J.C.S.

RJR-MACDONALD INC.
Requérante

No: 500-05-009760-883

IMPERIAL TOBACCO LIMITÉE
Requérante

c.

LE PROCUREUR GÉNÉRAL DU
CANADA
Intimé

c.

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CANADA
Intimé

31 octobre 1989 - Vol. 16

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RJR-MACDONALD INC.

Pour la requérante
IMPERIAL TOBACCO LIMITÉE

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In the year of Our Lord nineteen hundred and eighty-nine (1989), on this thirty-first (31st) day of the month of October, PERSONALLY CAME AND APPEARED:

5 Me COLIN K. IRVING:

Pour la requérante, RJR-Macdonald, Colin Irving et
Georges Thibaudeau.

Me SIMON V. POTTER:

10 Et pour la requérante, Imperial, Simon Potter et Lyndon
Barnes.

Me ROGER E. BAKER, Q.C.:

Et pour l'intimé, le Procureur général du Canada, Roger
Baker, Claude Joyal et Paul Evraire.

15

In the year of Our Lord nineteen hundred and eighty-nine (1989), on this thirty-first (31st) day of the month of October, PERSONALLY CAME AND APPEARED:

5 MICHAEL WATERSON,

WHO, after having been duly sworn on the Holy Bible, doth depose and say as follows:

10 THE WITNESS:

A- My Lord, Mr. Baker, would you mind if I made a small correction to my testimony of yesterday before we start? I checked overnight one of the facts which I referred to yesterday, which is in need of alteration. Would that
15 be...

THE COURT:

Which one?

CROSS-EXAMINATION BY Me ROGER E. BAKER, Q.C.,

20 On behalf of Respondent:

Q- In connection with what subject, Mr. Waterson?

A- In connection with the receipt of fees from institutions that I've testified on behalf of.

Q- Yes, you could correct that. What did you say?

25 A- On page two two one five (2215) of the transcript, I

see, I said -- you asked me whether I was paid for an appearance before the Committee of the Canadian Parliament.

1/0075

Q- Hm, hm.

5 A- And I said I believe I just received the airfare. In fact, I did in fact -- I checked with my office this morning and I did receive a fee as well. I stayed a weekend for that purpose.

THE COURT:

10 Q- What page?

A- Two two one five (2215).

Q- And in relation to what incident?

A- In relation to my appearance on Bill C-51 in front of the Canadian Parliamentary Committee. The fee was paid
15 by the Canadian Institute of Advertising.

Q- Okay.

Me BAKER:

Q- Okay? I take it then that what you did was you went through the transcript and you looked through it for
20 errors and this is the correction that you -- the only correction you wish to make in connection with yesterday's testimony?

A- I've only had five (5) minutes to look through the transcript, I'm afraid, and I certainly haven't been
25 through it in detail. One other thing that -- whilst

thinking about the trial last night -- I may have said -- was that there was no -- but I haven't checked with the transcript -- I may have said there was no tobacco advertising during the world war, the second world war.

5 If I said that, I don't know whether I did or not...

Q- No, you didn't.

A- I didn't, okay.

Q- No, you did not.

A- There were certain -- there may have been some, but it certainly wasn't very much, but as far as I'm aware, looking, reviewing the evidence of the previous day last night.

10

Q- Very good.

Now, Mr. Waterson, how much did you get paid by the Canadian Institute of Advertising to appear before the Committee of the House of Commons in connection with Bill C-51?

15

A- I was paid at what is the daily rate I charge to anyone who wishes to employ my services, which at that point in time was, I believe, seven (700) or eight hundred (800) pounds a day.

20

Q- Hm, hm.

A- And I was there for just two (2) or three (3) days.

Q- I see. Now, you made an undertaking yesterday, as you may recall, to look through a book you had...

25

A- Yes.

Q- ... to determine what the consumption was, the high point of consumption in the United Kingdom.

A- That I have done.

5 Q- M'hm. And is there a special page in that book which would lead us to the answer...

A- There are ...

Q- ... in respect of cigarette sales or to...

A- There are two (2) tables in the book that have slightly
10 different versions of the same thing.

Q- Well, let's take it one table at a time.

A- Okay. Table 1.1 on page four (4) has sales of -- total annual sales of manufactured cigarettes, and the high spot was in nineteen sixty-one (1961). Those have a --
15 are not...

Q- Hold on for a moment.

Me IRVING:

Just a minute. Let him finish, please.

Me BAKER:

20 I can't see it.

A- The little spot next to it, one one o (110), total manufactured cigarettes.

Q- Yes, m'hm.

A- Those, however, are not per capita figures. Those are
25 simply total annual sales of tobacco...

Q- Products.

A- ...in thousands of tons manufactured cigarettes, but it's not divided by the population, so it's just total. The population grew over that period.

5 Q- M'hm. You've put a little spot in a column where the word "pipe" appears at the top under tobacco.

2/0038 A- No, no, no. I'm sorry. It's at the right of the column which is marked "total."

10 Q- Oh, I see. Now, a hundred and ten point three (110.3) means what?

A- That is a hundred and ten point three (110.3) thousands of tons manufactured weight.

Q- I see. The high point, it would appear, for manufactured cigarettes, was nineteen sixty-one (1961)?

15 A- On that table.

Q- On that table. And what about other kinds of tobacco products? What was the high point for them?

A- That I haven't checked. You asked me to check for cigarettes. Here we have...

20 Q- Well, what about -- you know, the kind of tobacco that you use for roll-your-own cigarettes?

A- Well, here is pipe tobacco which...

Q- No, I'm talking about tobacco for roll-your-own cigarettes, not pipe tobacco?

25 A- That is here.

Q- Hand rolling is it?

A- This is this column. And that appears to be in nineteen sixty-four (1964).

Q- I see. So...

5 A- Unless there is a bigger one on the previous page, this only goes back to forty-eight ('48). Hand rolling. Yes, the high spot would be definitely nineteen sixty-four (1964).

2/0062 Q- So then, for cigarettes there are -- statistics are
10 computed two (2) ways, one for manufactured cigarettes and one for tobacco in connection with roll-your-own.

A- Yes.

Q- And on the chart that you're showing me in this book
called "U.K. Smoking Statistics," at page four (4), the
15 high point for manufactured cigarettes was nineteen sixty-one (1961) and the high point for tobacco for roll-your-own cigarettes was nineteen...

A- Sixty-four ('64).

Q- ...sixty-four (1964). So that varies somewhat then with
20 your testimony yesterday that the high point for consumption in the United Kingdom was just after the war, was it not?

A- That doesn't vary at all, because they're totally
25 different things. This, we're talking about manufactured cigarettes, whereas I was quoting the sales

of all tobacco products yesterday. In addition...

Q- Wait a minute. You just said manufactured cigarettes.
Roll-your-own...

Me IRVING:

5 Just a minute. Whoa, whoa, whoa! My Lord, may we not
get going on these interruptions this early in the
morning or at all today, please. Let Mr. Waterson
finish his answer, please.

2/0105 A- In addition these are sales of manufactured cigarettes,
10 full stop. Whereas yesterday I was discussing tobacco
consumption per capita and obviously with a growing
population the two totals are quite different.

Me BAKER:

Q- I'm not sure I understand that. We're talking about all
15 kinds of tobacco.

A- Yesterday I was describing all tobacco products. That
is cigarettes, pipe tobacco, hand rolling cigarettes and
so on.

Q- All right. Well, let's take it one by one.

20 A- This is simply manufactured cigarettes.

Q- No, it's -- I thought you just showed me a column for
regular hand rolled tobacco.

A- Plus we discussed hand rolling tobacco.

Q- Yes. And the high point for the hand rolled tobacco was
25 nineteen sixty-four (1964), I think you said?

A- That's correct, yes.

Q- All right. So far we've got to -- into the nineteen sixties (1960s), into the decade of the nineteen sixties (1960s), correct?

5 A- In total terms, not in per capita terms.

1/0134 Q- Oh, were you talking about per capita terms yesterday?

A- Yesterday I was talking in per capita terms.

Q- Meaning the high point for the individual's consumption was just after the war?

10 A- Meaning the high point in all tobacco products consumed per person in the country was just after the war, nineteen forty-five (1945) and forty-six ('46), I believe, together were the two peak years.

Q- And that would be relevant, a statistic like that, Mr.
15 Waterson, in connection with what?

A- With attempting to look at when people, in general, were smoking most. Looking at the total amount of manufactured cigarettes consumed not in relation to people is a different way of looking at the situation.

20 Q- Now, Mr. Waterson, you're an expert in gathering statistics of tobacco advertising expenditures?

A- I have spent some time gathering statistics on advertising expenditures. Tobacco advertising statistics fall out from that as one of the six or seven
25 hundred (6-700) different categories that I collect.

Q- When you say you've spent some time. When I asked you yesterday what it was you were expert in, didn't your answer go to the issue, primarily, of that you were in the business of gathering these kinds of statistics?

5 A- I am in the business of gathering statistics, but the amount of time I've spent specifically gathering statistics on the advertising of tobacco products has been very small indeed.

Q- Well, I'd ask you to turn to page eleven (11) of your expert's report. You have it in front of you?

10 A- I do.

Q- Would you be good enough to look at paragraph, numbered paragraph forty-one (41), please?

A- Yes.

15 Q- Now, I see in the second to last line the words,
"...advertising expenditure has risen by seven point five percent (7.5%) in real terms since nineteen seventy-five."

A- Yes.

20 Q- Correct?

A- Yes, correct.

Q- You wrote that?

A- I did write that.

Q- Good. Now, did you gather that, the information, so
25 that statistic could appear on the page?

A- That statistic is derived from data that I collect as a regular part of my job at the Advertising Association.

Q- M'hm.

5 A- It is one of the many hundreds of categories of advertising expenditure that are automatically collected each year.

Q- How accurate is that statistic?

A- It is the most accurate -- in my judgement it is the most accurate statistic that is available.

10 Q- Is that because you have tried to collect information yourself?

A- That is because, as I explained yesterday, we take the figures collected by Media Expenditure Analysis Ltd. which are the only ones available, apart from very similar ones from an identical company that collects data in the same way. We take the data from that company which doesn't include discounts in its expenditure calculations. We take away the discount that manufacturers obtain when they negotiate advertising rates and apply those discounts to the data to produce the kinds of figures that we look at for advertising spent by industry.

20 Q- Now, Mr. Waterson, you have done a considerable amount of work for the tobacco companies in the United Kingdom in the past?

25

A- No, I've done very little work directly for the tobacco companies.

Q- Oh, I see.

A- I've done a great deal for the advertising industry...

5 Q- I see.

A- ...in connection with tobacco advertising.

Q- In connection with tobacco advertising. Now, did you attempt to go through your connections with the Advertising Association of the United Kingdom, of which you are research director, and attempt to talk to the tobacco companies to determine what their expenditures were in the period you cite in paragraph forty-one (41)?

10 A- No, as I've already explained, I have substantial experience of going to manufacturers of all kinds to ask for advertising expenditures, and in almost all cases the results that are derived are of a very poor quality because manufacturers tend to regard these figures as secret and be very reluctant to divulge them.

15 Q- So, then, it would be without purpose, if I understand you correctly, to go and ask them for the information because they're reluctant to divulge the information?

20 A- My experience would suggest that I might get the information or partial information from one company or maybe two, but I would be unlikely to get comprehensive data covering advertising expenditure, and therefore the

25

best way of getting these kinds of information is to go to the company Media Expenditure Analysis Limited and derive the data that way.

5 Q- In the event that you had cooperative manufacturers in the United Kingdom, would you agree with me that the numbers that they gave you would reflect a more accurate statistic in the end than those which you've derived by yourself?

10 A- They would depend -- well, first of all, I would have to look at the calculations and see how they were done because there are nearly always difficulties in these kinds of figures, but I would agree that, in principal, if totally accurate information could be obtained from the files of the tobacco companies it would be more accurate than doing it in the way I have done it.

15 3/0115 Q- So, therefore, when you say advertising expenditure has risen by seven point five percent (7.5%) in real terms since nineteen seventy-five (1975), that's kind of a hypothesis, that's not a really hard empiric answer, is it, Mr. Waterson?

20 A- The data is of the kind that is used by the entire advertising industry in Britain to look at these kinds of figures. These are the kinds of data that I provide for British industry to look at advertising expenditure and which are usually regarded as the most -- the best

25

available for these purposes.

Q- Well, for example, who in Great Britain would use information like that, that seven point five percent (7.5%) increase?

5 A- Well, we have, as I explained yesterday, approximately fifteen thousand (15,000) telephone calls each year to the Advertising Association, to my department in the Advertising Association. Many of these calls are for statistics of this kind which we provide to the industry as a whole.

10 Q- M'hm. What kind of person, I mean you said fifteen thousand (15,000) calls, that's quite a lot of calls and I don't imagine you take them all by yourself, but...

3/0145 A- I try to avoid that.

15 Q- Yes. In connection with tobacco, maybe you have taken some of these calls from time to time over the years, what kind of people seek information like that?

A- People who are, the calls range -- are in great variety -- from people such as yourself who are interested in public policy decisions down to students...

20 Q- People such as myself?

A- People such as the people in this courtroom today, who are interested in public policy questions, down to students who are doing university theses, but the great majority of the calls are from people within the

25

advertising industry, in media companies, in advertising agencies and, indeed, from the advertisers themselves seeking to define how much their competitors are spending.

5 Q- What did you mean when you said, in paragraph forty-one (41), "real terms?"

A- Dividing by inflation. If you take any series in monetary terms, it will incorporate price inflation which is rampant in most countries of the western world.

10 So, to look at any series in proper terms, you really have to deduct price inflation to get at a figure that we in the U.K. refer to as "real terms." In other terms, a real reflection of growth or decline, in fact.

3/0188 Q- Now, you remember yesterday you were talking about the
15 tables -- Table 1, Table 2, Table 3, Table 4 and Table 5.

A- Yes.

Q- And on the new package you gave us the corrected version on the top, on the front page there's written:

20 "International Tobacco Consumption Data, Allied Information Technologies."

A- Yes.

Q- Now, Mr. Irving, your counsel asked you if you prepared them and you said that you prepared them in the sense,
25 I'm quoting from page twenty-one sixty-seven (2167),

"I prepared them in the sense that they were prepared under my direct supervision."

Do you see it, page twenty-one sixty-seven (2167), so you're not led into error.

5 A- Yes.

Q- Right. Now, I'd like you to elaborate on that a little bit. What did you do to get the data for these five (5) tables?

A- To get the data for these tables, first of all I attempted to find out all of the various sources that actually produced data on tobacco consumption.

3/0234 Q- How do you do that?

A- Well, first of all, I looked in our files to see what individual data we had in our files and there was some data on the U.K., for example, the book by Sir Richard Doll, and it was derived from the Advertising Association library.

Secondly, I telephoned an organization called "Infotab," which stands for Information Tobacco or Tobacco Information. And this organization provides tobacco -- information on tobacco to people who request it.

Q- Is that a company?

A- I'm not sure of its formal constitution. It is an individual organization in its own right.

Q- M'hm. And what did you do? You called them and you asked them if they had any tables that you could use?

A- I called them and asked them if they could provide me with data covering various countries and they said, yes they could.

Q- Of all of the data in the five (5) tables, Mr. Waterson, and there's, as you know, quite a lot of it, did they provide you with a lot of the information or a little bit of the information?

A- They came back to me with a list of bodies from around the world which were likely to provide information and suggested that I or they fax each of these organizations in an attempt to get the data from them. They didn't have on their premises, they had very little data, in fact, on their premises. In actual fact it was they who faxed the -- because it required a great deal of faxing and I did not have the resources to do that -- they faxed around the world to obtain these data on my behalf.

Q- Oh. And so a lot of the information in the tables came to you through Infotab?

A- Indeed.

Q- I see.

A- They did have on the premises the Maxwell reports which they sent over to me in toto, which I went through

personally.

Q- Hm, hm.

A- So the Maxwell data I derived from the Maxwell reports,
by going through them little -- piece by piece.

5 Q- Now, what -- just the numbers, the exhibit numbers...
Monsieur le greffier, 26-A, c'est le numéro de cet
exhibit?

THE COURT:

Oui.

10 Me BAKER:

Q- Bon. Now, you testified yesterday that you had a report
and attached to the report is a series of tables.

A- Yes.

15 Q- You heard your lawyer tell the Court that several weeks
ago, I was handed a corrected series of tables?

A- Yes.

Q- Yes?

A- Yes, indeed.

20 Q- And then yesterday, you provided us with a further
series of tables which is the -- to the extent that
you're capable of producing it, the perfect series of
tables. Correct?

A- That is correct, yes.

25 Q- Good. Now, who discovered the errors, could you tell
the Court...

4/0043

A- The...

Q- ... in the series -- I'm not finished, Mr. Waterson...

A- I'm sorry.

5

Q- ... in the series of tables that I was given by Mr.

Irving several weeks ago? Who discovered those errors and when?

10

A- They were discovered by, many of them by myself, many of them by the statistician, the computational person who has been working on the statistics, collating them in the computer and by a number of other people who I gave the figures to to look at. Some of the errors were very tiny, such as spelling mistakes. Some of the more major ones were found by myself. I believe Mr. Irving himself found one and that is about it. There were a series of people who found errors in the tables.

15

Q- I see. So you're now referring to the errors in the first series of tables that produced the corrected tables that were handed to me a few weeks ago?

A- That I believe to be correct.

20

Q- And did the same procedure, in respect of the tables that we were given yesterday, "International Tobacco Consumption Data", Exhibit 26-A, obtained as well?

A- No.

Q- Who found the errors in the second...

4/0067 25

A- We... we...

Q- ... corrected document?

A- We made a decision that there was likely to be so much interest in these tables that from henceforth we would try to produce these tables in the same way that we produce international advertising expenditure data and in the same way that we are going to start producing international drink expenditure data. So we started as a matter of course looking at revisions to these tables, at ways in which they could be better data based. The revisions in the systems used to handle the figures threw up one (1) or two (2) further inconsistencies which were the -- comprised the bulk of the second lot of corrections.

Q- Now, you were engaged, were you not, in the year nineteen eighty-eight (1988), to be a witness for RJR-Macdonald and Imperial Tobacco in a trial that originally was to have taken place in November of nineteen eighty-eight (1988), Mr. Waterson?

A- That is correct.

Q- And you prepared a report in connection with that engagement for the trial that was to take place in November of nineteen eighty-eight (1988)?

A- My memory, I'm afraid, is indistinct on this point, but I believe I did, yes.

Q- Do you believe that there are substantial changes in the

original report that you prepared and gave to your counsel and the report which you have filed as Exhibit RJR-26?

5 A- I'm afraid I write many, many papers in the course of a year and I just, from memory, cannot answer that question. I would need to go and look at my original drafts and see. It is, I think, unlikely that I would have introduced many changes because my views on these subjects have developed slowly over a number of years
10 and I do not think they have developed greatly over the past year.

Q- So then it's your testimony, without having the document in front of you, unless your counsel have it available, that the report which you prepared and gave to your
15 counsel in the year nineteen eighty-eight (1988) is substantially the same as the report which you have filed yesterday as Exhibit RJR-26?

A- I believe that is a likelihood, yes.

Q- Hm, hm. And can the Court take it then that the tables
20 that are attached to Exhibit RJR-26 -- you know, the tables that have been corrected a couple of times -- those were attached to the original report last year, as well?

A- I simply cannot remember that, I'm afraid.

25 Q- Well, if you say that it's not likely that your report

would have substantially changed because your views wouldn't have changed...

4/0128

A- My views...

Q- ... it seems more likely rather than less likely that the same tables would have existed last year?

5

A- Not necessarily.

Q- No? Okay.

A- Not necessarily. My views, as expressed in the testimony itself, are unlikely to have changed, because my views of how the industry works hasn't changed. Whether or not tables were attached to the original testimony, when I decided it would be a useful idea to start collecting tobacco data in the form it is here today, I simply cannot remember. I have had fragmentary tobacco data of different kinds for many years and it is likely that in any testimony I prepared at that time, I would have put some tobacco data into the report, but this, this kind of report is a relatively new venture and I simply cannot remember when we started doing it.

10

15

20

Q- Now, you testified yesterday that the report, the expert witness statement was prepared in the early part of nineteen eighty-nine (1989).

Now, you also testified yesterday that you have with you at the Advertising Association, I believe, a librarian, a secretary. Do you have an executive

25

assistant or anything like that?

A- For most of last year, I had an executive assistant in addition to the staff I described yesterday.

5 Q- Hm, hm. Did your exec -- what is the name of this executive assistant, Mr. Waterson?

A- Andrew Sawkins.

Q- Andrew Sawkins. Did Andrew Sawkins help you write this expert witness statement?

10 A- I believe he played no part whatsoever in the writing of that expert witness statement.

Q- Is it your testimony that you wrote this entirely on your own and that your executive assistant played no part in this expert witness statement?

15 A- A number of people may have suggested modifications to the text over the period of time that I was working on it, but I don't believe Mr. Sawkins played any role at all in compiling that text.

Q- Who were the people who may have made suggestions to you?

20 A- My secretary, who's been working with me for twelve (12) years, and frequently makes suggestions about the way I write things.

Q- In respect of -- would that be in respect of grammar?

A- Usually...

25 Q- Or would it be in respect of substance?

4/0186

A- Usually in respect of grammar, but having worked many years with her, she also has a very good eye for knowing when I'm writing things in an obscure manner.

5

Q- I see. So we have your secretary giving you a bit of editorial comment. Who else, Mr. Waterson?

A- I believe Mr. Irving made a number of small suggestions.

Q- That's not important. You can eliminate what Mr. Irving may have told you.

A- Okay.

10

Me IRVING:

Well, I'm not sure that I am flattered, My Lord.

THE COURT:

That's to respect the confidentiality.

Me BAKER:

15

It's to respect the confidentiality, and actually it is an act of friendship. I'm trying to protect your reputation as well, Mr. Irving.

20

Q- Now, Mr. Waterson, we've now got your secretary who's giving you some input. There may or may not have been changes by Mr. Irving, and I don't want you to talk to that issue in front of the Court. Who else?

A- The people with whom I work at Allied Information Technologies may have suggested minor alterations but the bulk of the exercise was my own work.

25

Q- So, then, it could properly be said and properly be

understood by the Court that this is the work product of Michael J. Waterson?

A- Indeed, yes.

Q- And when I say "this" which I'm holding in my hands,
5 it's called "Expert witness statement and curriculum vitae of Michael J. Waterson".

A- Yes.

Q- Correct?

A- Yes.

10 Q- I wish you would try and be a bit more precise than you were yesterday, Mr. Waterson, in respect of the time which this report was drafted in the form, more or less in the form that we see it now. When you say the early part of nineteen eighty-nine (1989) -- excuse me, you
15 said the early part of nineteen eighty-nine (1989) -- are you talking about January, February of nineteen eighty-nine (1989)?

A- I'm afraid it is really beyond my -- the powers of my memory to say precisely when I wrote it. I may indeed
20 have written it in pieces. As with most people, I get periods of extreme busyness and I would have to put something of this kind down to allow other jobs to take precedence. I really cannot be precise as to when I wrote this.

25 I remember having checked it over fairly recently,

certainly immediately before it was issued, to look at it again, to see if there was anything that I wished to alter before it was actually produced to the Court, but when it was precisely written, I am really not clear.

5 It could have been written over a period of months or it could have been written over a period of -- a longer period of time. So I'm afraid I cannot be precise.

4/0253

Q- Hm, hm. Mr. Waterson, yesterday you said you testified before a Committee of the House of Commons of Canada.

10

You said you testified before the American Congress.

A- Yes.

Q- You also said you had been to Australia.

A- Yes.

Q- Did you testify in Australia?

15

A- It depends what you mean by "testify". I spoke...

Q- Give testimony under oath.

A- This is the only time I have ever given testimony under oath.

Q- How do you like it so far?

20

A- It is a much more debilitating experience than giving testimony before the Waxman hearings.

Q- I see. Now...

A- If for no other reason than from having to stand up all the time.

25

THE COURT:

Q- Don't worry, it's the same procedure in England.

Me BAKER:

5 Q- If you didn't testify under oath in Australia, what did you do?

A- I spoke to a number of State Health Ministers and to a variety of other people. I spoke to so many people during the trip, I'm afraid I cannot be precise as to who they were.

10 Q- M'hm. And where else have you given public bodies the benefit of your knowledge and experience, Mr. Waterson?

A- Basically the list, I believe is U.K., U.S.A. on several occasions, Canada, Hong Kong, Australia and I think that's it. I don't think I have been anywhere else.
15 The major, the majority...

Q- Well, consider it. I want to make sure your answer is complete.

Me IRVING:

Just a moment -- just let him finish, please.

20 A- The majority of the times I have testified in this manner have been on tobacco advertising in the United States. I can think of nowhere -- and I can think of nowhere else to add to the list that I have given you.

Me BAKER:

25 Q- M'hm. I must confess, Mr. Waterson, I'm puzzled. Have

you never given any input to the tobacco issue in New Zealand?

THE COURT:

In where?

5 Me BAKER:

New Zealand, My Lord.

5/0075

A- I have written a critique of a work that was produced in New Zealand.

Q- You have written a critique?

10 A- I have written a critique of a work that was produced in New Zealand, but I've never -- I've been to New Zealand, in fact, but that in that connection. I stopped at a...

Q- What do you mean you've written...

Me IRVING:

15 Just -- would you please, Mr. Baker, would you let the witness finish answering the question.

Me BAKER:

Yes, finish the question.

Me IRVING:

20 My Lord, may I ask that Mr. Baker be asked in the future, so I don't have to...

THE COURT:

No, he's trying very hard. He's trying very hard.

Me IRVING:

25 Well, not very successfully.

THE COURT:

You're trying very hard.

Me BAKER:

I'm remarkably restrained under the circumstances, Mr.
5 Irving.

Q- What do you mean, "a critique?"

A- I wrote a critique of a report that was produced in New
Zealand by the New Zealand government some months ago.

Q- You wrote a critique?

10 A- Sorry, I -- to be precise, I helped to write a critique
of a document, but I have not been to New Zealand to
testify nor have I testified, as far as I remember,
before any New Zealand ministers or other government
officials.

15 Q- Well, have you got that critique with you?

A- I may have it with my papers.

Q- Perhaps you'd want to verify your papers.

A- You mean you would like this produced before the Court?

Q- I'll determine when I want something produced, Mr.

20 Waterson, I asked you if you had a copy of your critique
with you?

A- I believe I have a copy of the critique I wrote in my
bag, yes.

Q- I beg your pardon?

25 A- In my bag, which is at the rear of the courtroom.

Q- Would you be good enough to go to the rear of the courtroom and go into your bag and get the critique?

May I have a look at that?

5/0135

THE COURT:

5 What's it called?

Me BAKER:

10 It's called, "An Appraisal" -- I have a copy for you, My Lord -- "An Appraisal of the Advertising Analysis and Conclusions in the Health and Tobacco Report from the Toxic Substances Board of New Zealand." Goodness gracious!

Q- Well, you just hold on to that one. I will give the Court this document and I have a copy for each of my friends on the other side, and they're all marked with little yellow tabs with green numbers, My Lord. And I'll give you one of these as well, Mr. Waterson, so you can follow this.

Now, if you open up to the -- you see the first page.

20 A- Yes.

Q- It's called, "Independent Scientific Review of the May 1989 Toxic Substances Board Report."

A- Yes.

Q- "Commissioned by the Tobacco Institute of New Zealand."

25 A- Yes.

Q- Have you seen that page before?

A- I have never seen that page before, I don't think, no.

Q- Uh, huh! Maybe you'd want to spend a moment or two
looking through the document.

5 Me IRVING:

Well, My Lord, shall we just, before we go any further,
and I'd like to ask my friend whether he is saying to us
that Mr. Waterson's critique, which he spoke of, is the
same document as this which is now being shown to the
10 witness.

Me BAKER:

It would appear to me, My Lord, that the critique of
which Mr. Waterson spoke is a truncated version of the
document that I have just put before Mr. Waterson, and
15 furthermore there are fifty-one (51) paragraphs in the
written witness statement or expert's report that Mr.
Waterson has filed as Exhibit RJR-26, and forty-three
(43) of the fifty-one (51) paragraphs find themselves in
virtually identical language in the report that was
20 filed on behalf of the International Tobacco Industry in
New Zealand. We will be going through those one by one.
This is the report that Mr. Waterson has just testified
to as having been written...

Me IRVING:

25 Well, that's...

Me BAKER:

I am not finished, Mr. Irving. As having been written
by him.

THE COURT:

5 Please sit down. Are you finished?

Me BAKER:

Not quite.

Me IRVING:

10 Just a moment. Well, then I have something to say, My
Lord.

Me BAKER:

No, I am not finished, Mr. Irving.

Me IRVING:

Well, then carry on, Mr. Baker.

15 Me BAKER:

Now, just so we don't mislead you...

THE COURT:

Well, I mean are you finished your ...

Me BAKER:

20 No, I'm going to deal with the document that he's got,
My Lord, which is the issue that Mr. Irving was raising.
I don't want the witness misled and I don't want the
Court misled.

Q- Now, maybe you want to take this other stuff away for a
25 moment so we don't get it all mixed up. Take your time.

Okay?

A- Okay.

5/0217

Q- Now, you've got this document I've given you and where's the one that you've brought out of your bag?

5 A- This is my -- this is the...

Q- No, no, the other little document. That's right! Could I see that for a moment?

A- Yes, of course.

Q- Well, in the document that I've put before you under Tab
10 #4, My Lord, the yellow tab with the green number 4 on top, I see,

"M.H. Gamma, An Appraisal of the Advertising
Analysis and Conclusions in the Health and
Tobacco Report from the Toxic Substances Board
15 of New Zealand. A report prepared by Dr. L.W.
Hagan, M.H. Gamma Consulting Ltd., D. Martin,
M.H. Gamma Consulting Ltd. in conjunction with
M.J. Waterson, U.K." -- is that you, M.J.
Waterson?

20 A- Yes, indeed.

Q- "...U.K. for the Tobacco Institute of New
Zealand, July, 1989."

A- M'hm.

Q- Right?

25 A- Yes.

Q- So if you would just go through the document that I have handed you and match it to the report that you pulled out of your bag, tell the Court whether it's the same document?

5 A- That -- it is not the same document.

Q- It is not the same document?

A- It is not the same document. It is a close relative, but it is not the same document as you will see, if you look at the summary of conclusions.

10 Q- Well, I see page two (2) on my document and page two (2) -- hold on. Page two (2) of your document...

Me IRVING:

My Lord, just a moment. My Lord, I have a submission to make. I will not have Mr. Baker being gratuitously
15 rude. "Hold on" is not an expression which counsel is entitled to use to a witness under any circumstances, and I've been as patient as I can bring myself to be over days of calculated rudeness, exaggerated gesturing and posturing. Let Mr. Baker ask questions to the
20 witness, but I would ask, My Lord, that he be directed, since he apparently cannot take the suggestions, that he is not entitled to do other than ask questions, he is not entitled to give orders, he is not entitled to use that tone, and I would ask that he be ordered to stop.

25

Me BAKER:

I submit to you...

Me IRVING:

Counsel may ask questions.

5 Me BAKER:

I submit to you, My Lord, that the report that has been produced as an expert witness report by this witness, Mr. Waterson, was written by two other people as identified...

10 THE COURT:

Yes, but before we get into that.

Me BAKER:

Yes.

THE COURT:

15 I don't know exactly. The witness has a document in front of him and I have something else...

Me BAKER:

Show this to the Judge, please.

THE COURT:

20 | And I don't know what -- okay. Yes?

Me BAKER:

Q- Now, you have in front of you, Mr. Waterson, a booklet which I have shown you, the top page of which reads "Independent Scientific Review of May nineteen eighty-nine (1989) -- Toxic Substances Board Report

commissioned by the Tobacco Institute of New Zealand".

A- Yes.

Q- Good. Now a good way through the document that I've shown you, we see something called Appendix "C".

5 A- Yes.

Q- An appraisal of the advertising analysis and conclusions. Correct?

A- Yes.

10 Q- Report prepared by Hagan, Martin, in conjunction with M.J. Waterson.

A- That is correct.

Q- Correct? Now the document that you've brought seems pretty close.

A- It is a close, as I said, a close relative...

15 Q- A close...

A- ... but it isn't precisely the same document.

Q- A close relative. In other words, at the top right corner, you don't see Appendix "C" typed in.

20 A- The changes are slightly more substantial than that, but I would accept...

6/0175

Q- Well, we will get to the substantial changes and you'll have every opportunity to point out to the Court what the substantial changes are. Incidentally, was this document prepared in isolation to any other document or
25 how did this document, the one that you pulled out of

your bag, get prepared? Now, I don't mean all the research that went into it. I mean how and why was this prepared?

5 A- I was approached in possibly June or July -- I don't remember the precise date -- by a large U.K. tobacco company with interests in New Zealand.

Q- Hm, hm.

10 A- They wished me to write a critique of the New Zealand Toxic Substances Board report. I refused because I was simply too busy. I had too many things on my plate and I just felt I simply could not accept the responsibility for writing a detailed critique of such a large and involved document. I suggested to the company that they should go to Gamma Consulting who, I felt, would be able
15 to do an adequate and that I, as part of my responsibilities for the Advertising Association, would help Gamma Consulting over those aspects of the report that I felt competent to look at and could cover in a very short space of time.

20 Gamma Consulting were subsequently, I understand, given a contract to produce a critique. They did a great deal of econometric work which is to be found in the middle of this report. I helped them to write the paragraphs which you have found to be similar to those
25 which are in the expert witness statement. Clearly, the

advent of the word processor means it is not necessary to rewrite a paragraph about a certain subject every time that one wishes to put down one's thoughts again.

Q- Let's see...

5 Me IRVING:

Just a moment, please. He's not finished.

A- So it is easy to understand, I hope, why the paragraphs that I wrote in this report are identical to the paragraphs in that report. They came...

10 THE COURT:

Q- Mr. Waterson, I'm interrupting you because I think you'll be given enough opportunity to justify whatever you want to justify, but please try to stick to the questions as they are asked, and if you feel there is something you need to add, maybe you could slide the Court and, you know, but that wasn't the question, I believe.

15

Me BAKER:

Precisely. Read the question back to the witness, please.

20

REREADING OF THE QUESTION.

6/0252

Me BAKER:

Q- Let's, for a frame of reference, call the document that you have brought to Court with you, just for the moment, document "X". All right?

25

A- Okay.

Q- And we will call the document that I have shown you,
"The Independent Scientific Review", document "Y".

A- Yes.

5 Q- Does document "X" contain the exact language of
paragraphs one (1) to forty-three (43) of your expert's
report filed as RJR-26, with some minor changes? And we
are going to go through each and every one of your minor
changes, I can assure you, sir.

10 A- I would assume that what you say is correct and that
that is the case, yes.

Q- Could you please find that part of document "X", the one
that you have brought with you, where it begins with
section one (1), paragraph one (1) of your expert
15 witness statement?

THE COURT:

Do you have a copy of document "X"?

Me BAKER:

Q- Do you have copies of that?

20 A- I'm afraid this is the only one.

THE COURT:

Q- Oh, that's your only one?

Me BAKER:

Q- That's it. Well, in any event, could you find it?

25 A- I'm sorry, could I find where the things -- where the

two (2) documents -- where my expert witness statement is identical with this document?

Q- Well, just -- if you find the first one, we can go from there, and it will be very easy, but you see, the first paragraph...

A- The role of...

Q- ... the one where you say: "Advertising can be defined..."

A- The role of advertising, yes.

Q- Yes, in the document I've shown you, it's exact, you see, in the first paragraph.

A- Well, this is Appendix 1, and page thirty-seven (37).

Q- Yes, could you turn to page thirty-seven (37)? Okay, we're getting somewhere now.

What you'll find, My Lord, in the document that I have given you, which we have for the moment called document "Y", in Tab number 7 -- do you have it?

THE COURT:

Yes.

Me BAKER:

At the top of the page, you see "Appendix 1 - The role of advertising in general"?

THE COURT:

Hm, hm.

Me BAKER:

Q- Now, do you see in the document "Y" I gave you, Mr. Waterson, "The role of advertising in general"?

A- I do indeed, yes.

5 Q- And do you see in Appendix 1 "The role of advertising" in document "X" that you brought to Court?

A- I do indeed.

Q- And would you be good enough to open up your -- what are we calling -- the expert witness statement on the very
10 first page. Same thing: "The role of advertising in general"?

A- Yes.

Q- Do you see that?

A- I do.

15 Q- Now, would you be good enough to read out loud the first paragraph of your expert witness statement?

A- "Advertising can be defined as the paid for communication of information. As such, it is used for a variety of purposes, ranging from
20 the publicizing -- from publicizing the availability of branded goods, generic campaigns, "Drink more milk", through to job recruitment, charity fund raising and a wide variety of other non commercial purposes.
25 Most advertising is bought in connection with

selling branded goods and services."

6/0321

Q- Hm, hm. Now, could you read the first paragraph into the record from the document that you brought, the document "X"?

5 Me POTTER:

My Lord, I wonder if this is really necessary. We'll have an interminable transcript. It will take two (2) days to read one paragraph from here, one paragraph from there. I wonder what Mr. Baker would be saying if the paragraphs were different. It's hardly surprising an expert witness says the same thing in two (2) different places of the world about the same topic.

10

THE COURT:

Okay, but don't argue that now. I was going to intervene to say if you want to read all the paragraphs, maybe you could ask the witness whether paragraph one (1) is identical to...

15

Me BAKER:

I can assure the Court I have no intention of having this witness read each and every paragraph three (3) times, but please bear with me for a while, My Lord...

20

THE COURT:

Okay.

Me BAKER:

... because the documents that the witness has in front

25

of him, not counting the expert witness report, reflects a very serious problem in connection with his testimony I'm sure you can discern.

5 Q- Now, Mr. Waterson, you're going to now read the first paragraph of that document "X" which you brought out of your bag.

10 A- "Advertising can be defined as the paid for communication of information. As such, it is used for a variety of purposes, ranging from publicizing the availability of branded goods, generic campaigns, "Drink more milk", through to job recruitments, charity fund raising and a wide variety of other non commercial purposes. Most advertising is bought in
15 connection with selling branded goods and services."

20 Q- And if you would very briefly look over to the first paragraph of document "Y" that I've given you, so that we won't take up too much of the Court's time, and tell the Court whether the language in the first paragraph in that document of Appendix 1 is not identical to the two (2) paragraphs you've just read?

A- It looks identical to me.

25 Q- All right. Well, please just look at it a little bit more carefully and give a more accurate answer than "it

looks".

THE COURT:

It is.

Me BAKER:

5 Thank you, My Lord.

A- It is.

Q- Good. Now, could you tell the Court who wrote that paragraph?

A- I wrote that paragraph.

10 Q- Now, could you tell the Court whether it might not have, in fact, been written by Dr. Hagan?

A- No, it was absolutely written by me.

Q- Absolutely written by you?

A- Yes.

15 Q- And how does the Court know to believe you that it was absolutely written by you? Because you see -- I'm not quite finished, Mr. Irving -- you see in the full document -- I'm going to run you through a little exercise, all right?

20 Now, you've got document "Y" in front of you?

A- I have.

Q- The big one?

A- The big one.

Q- Right. Now, if you turn to Tab 1. Do you see Tab 1?

25 A- Yes.

Q- Now, that is the index of the larger document which we called "Y".

A- M'hm.

Q- Correct?

5 A- Yes.

Q- And if you look at the appendices, C -- see A, B and C?

A- Yes, I have it.

Q- You see, "An Appraisal of the Advertising Analysis and
Conclusions in the Health and Tobacco Report from the
10 Toxic Substances Board of New Zealand, M.H. Gamma
Consulting."

A- Yes.

Q- So you see that?

A- I do.

15 Q- Good. Now, if you'll turn to Tab 2. M'hmm, see it?

A- Yes, I have it.

Q- Now, Tab 2 is the body of the report as opposed to an annex?

A- Yes.

20 Q- Or an appendix?

A- Yes, indeed.

Q- You understand me?

A- I do understand.

Q- It being the body of the independent scientific review?

25 A- Yes.

A- I see that. I see that.

Q- Good. And, of course, you might notice that your words, the words just below that shouldn't be unfamiliar to you because they are the words that appear...

7/0108 5 A- The very same words again.

Q- Yes, the very same words that appear in your expert report. Good!

Now, if you'd be good enough to turn to Tab 4, Mr. Waterson, which is the title page...

10 A- Yes.

Q- ...of Appendix C, it's a report, you see, prepared by Hagen, Martin, in conjunction with Waterson?

A- Yes.

Q- Correct. And then if we turn over the page to Tab 5, the introduction, sort of formal introduction to this Tab C, correct? Do you see it?

A- Yes, I see it.

Q- And it says in the second paragraph,

"In order to critically appraise the TSB report a substantial quantity of data had to be collected from many different sources. Infotab played a key and enormously helpful role with this data collection."

It goes on and so and so forth, you only had five (5) days to finalize it.

And that introduction is signed by none other than Dr. L Hagen, D. Martin and M.J. Waterson, seventh (7th) of July, nineteen eighty-nine (1989).

A- Yes, indeed.

5 Q- That's you? That's -- you're the M.J. Waterson.

A- It is the same. Yes. Yes, indeed.

Q- All right. Now, if you'd be good enough to turn to Tab 6 of the book I've given you, flip the page, please. At page six (6) you're going to see something marked in green; do you see it?

10 A- I do see it.

Q- M'hm. Est-ce que vous le voyez, Votre Seigneurie, le paragraphe juste avant le dernier sur la page six (6)?

THE COURT:

15 Okay.

Me BAKER:

Il commence avec les mots "Explaining to non-marketing people". Vous l'avez?

Q- You see, it says,

20 "Explaining to non-marketing people the exigencies of life at the coal face in a competitive consumer market is a difficult and lengthy business. Appendix I, the role of advertising attempts to explain why

25 advertising is used and what it can and cannot

do."

Correct?

A- Yes.

7/0184

Q- So you have -- this is your lead in to Appendix I and
low and behold, Appendix I we find at Tab #7; correct?

5

A- Yes.

Q- And I invite you, Mr. Waterson, to perhaps quietly to
yourself for a moment or two, because I'm giving
credence to Mr. Potter's injunction it would be unwise
to have you read these things slavishly paragraph by
paragraph. We might be here for a very long time, but
you might want to familiarize yourself with Appendix I
and with some changes, which we will discuss in a few
minutes, tell the Court whether it isn't fundamentally
and virtually one hundred percent (100%), in at least
forty (40) of the forty-three (43) paragraphs, exactly
what appears on your expert witness statement which you
said you wrote? Take your time, sir.

10

15

THE COURT:

20

What I suggest we do is maybe, to give him the time...

Me BAKER:

Take the break now?

THE COURT:

Yes. So that we don't...

25

Me BAKER:

I am going to make a request to the Court that Mr. Waterson communicate with nobody while he is performing this exercise, My Lord, and I say that with no offense intended to Mr. Waterson, but I want to make sure that this is done properly. I regard...

Me POTTER:

If I might say, My Lord ...

Me BAKER:

I regard the documents in front of Mr. Waterson very seriously and in consequence of the existence of those documents, in connection with the testimony he gave yesterday and this morning, very very seriously in connection with his right to testify in this trial and I want no interference or interruption at all with this witness while he is perusing those documents.

THE COURT:

Can they express an opinion?

Me IRVING:

Mr. Baker ought to know, if he doesn't know, and I begin to doubt that he does, that we know that...

Me BAKER:

Then I'm always welcome to be taught by you, Mr. Irving.

Me IRVING:

...that we know that witnesses are not to be

communicated with during the course of their
cross-examination. He does not need -- I don't need Mr.
Baker, with his standard good manners, to tell us that.

Me BAKER:

5 Ah, excellent! Then I withdraw the request.

Me IRVING:

Excellent.

THE COURT:

Excellent. So, we'll take a fifteen (15) minute break.

10

SHORT RECESS

Q- I believe, Mr. Waterson, you were asked to familiarize
yourself with the document which we have called document
15 "Y" ?

A- Yes, I have.

Q- You have done that?

A- I have done that.

20

Q- Thank you. Now, would you be good enough to turn to
page forty-three (43) of document "Y", which is Tab 2,
the green Tab 2? Okay? Now, you see where it's marked
with a little green...

A- I see where it's marked with green.

Q- ... sort of artwork?

25

A- Yes.

communicated with during the course of their
cross-examination. He does not need -- I don't need Mr.
Baker, with his standard good manners, to tell us that.

Me BAKER:

5 Ah, excellent! Then I withdraw the request.

Me IRVING:

Excellent.

THE COURT:

Excellent. So, we'll take a fifteen (15) minute break.

10

SHORT RECESS

Q- I believe, Mr. Waterson, you were asked to familiarize
yourself with the document which we have called document
15 "Y" ?

A- Yes, I have.

Q- You have done that?

A- I have done that.

20

Q- Thank you. Now, would you be good enough to turn to
page forty-three (43) of document "Y", which is Tab 2,
the green Tab 2? Okay? Now, you see where it's marked
with a little green...

A- I see where it's marked with green.

Q- ... sort of artwork?

25

A- Yes.

Q- "The Board's opinion expressed here is in
direct contradiction to the arguments adduced
by M.H. Gamma Consulting Limited."

A- Yes.

5 Q- Correct?

A- Yes.

Q- Appendix "C", page thirty-seven (37) to forty-three
(43).

A- I see that.

10 Q- Now, when you see that, if you turn to Appendix C, page
thirty-seven (37) to forty-three (43)...

A- Yes.

Q- ... that's Tab number 7 in the book I've given you,
correct?

15 A- Yes.

8/0080 Q- Appendix 1 of Appendix C, but it is page thirty-seven
(37), do you see?

A- I see.

Q- And that is the argument adduced by M.H. Gamma. So if
20 you'd be good enough then to look at that which you have
in front of you and compare it to your own expert's
report...

A- It is...

Q- ...the same?

25 A- As you say.

Q- Correct.

A- In all material respects.

Q- In all material respects. So, therefore, the
Independent Scientific Review of May nineteen
5 eighty-nine (1989): "Toxic Substances Board Report,"
attributes pages thirty-seven (37) to forty-three (43)
to M.H. Gamma Consulting -- and M.H. Gamma Consulting is
the name on the top page of Appendix C, which is the one
reportedly co-authored by Hagan, Martin, in conjunction
10 with Waterson.

A- That's correct.

Q- Correct? Could you tell the Court which of the
paragraphs in Appendix 1, starting at page thirty-seven
(37), were written by Mr. Hagan?

15 A- None of Appendix 1 was written by Dr. Hagan.

Q- None.

A- I wrote the entire thing.

Q- And which of Appendix 1 was written by Mr. Martin?

A- Again none. I wrote the entire thing.

20 Q- So then this document that we've been calling document
"Y" is a lie, an inaccurate?

A- I don't follow you.

Q- Well, let's go back to page forty-three (43) again,
okay?

25 A- Okay.

Q- See the arguments adduced by M.H. Gamma Consulting Limited (Appendix "C"), page thirty-seven (37) to forty-three (43)?

A- Yes.

5 Q- These are arguments adduced by M.H. Gamma, right?

A- The name M.H. Gamma appears on the cover, but then so does mine. I wrote Appendix 1.

Q- So then this page forty-three (43) is wrong?

A- The page forty-three (43) attributes the arguments to
10 M.H. Gamma because it's kind of short -- I presume, I did not write this bit -- because it's a kind of shorthand for saying the M.H. Gamma report. The M.H. Gamma report was partially written by Dr. Hagan, partially written by Mr. Martin and partially written by
15 me.

Q- Now where does it say that?

8/0156 A- It doesn't say that. I say, I believe, because I didn't -- I did not write page forty-three (43).

Q- Did you write page fifty-three (53)?

20 THE COURT:

Of...?

Me BAKER:

Tab 3.

THE COURT:

25 Tab 3.

A- No, I didn't write page fifty-three (53).

Me BAKER:

Q- You see where it says a full dissertation of the
economic effects of different types of advertising for
5 different types of markets and messages is provided by
M.H. Gamma Consulting Ltd. at Appendix C, page
thirty-seven (37) to forty-three (43). You didn't write
that?

A- I didn't write that bit.

10 Q- Okay. Now, if you just look below that:

"Advertising can be defined as the paid for
communication of information."

Did you write that?

A- That is taken directly from Appendix 1, as we now have
15 established.

Q- So then the people who put this document together,
you're saying, were misleading the reader because on any
reasonable reading of pages forty-three (43) and
fifty-three (53), one is led to the conclusion that a
20 significant part of what appears on thirty-seven (37) to
forty-three (43) has been written by M.H. Gamma
Consulting, i.e. Hagan...

Me IRVING:

My Lord, the witness...

25

Me BAKER:

Not quite finished, Mr. Irving.

Q- ... i.e. Hagan, Martin and in conjunction with M.J.
Waterson -- you? Right?

5 Me IRVING:

My Lord, just a moment, I have an objection in that Mr.
Waterson has already said he didn't write that part of
the report. I don't know how he can be asked whether
the persons who did write it were either intentionally
10 or otherwise misleading anybody. Mr. Waterson has said
he wrote Appendix 1, which is summarized in Tab 3 and
appears in full in Tab 7, but he did not write the rest
of it. So my friend can ask him about what he did
write, but I don't know how Mr. Waterson can help the
15 Court on what was meant by a paragraph at page
fifty-three (53) or forty-three (43) which Mr. Waterson
didn't write.

Me BAKER:

Q- Well, would you disagree with that? That paragraph in
20 page fifty-three (53)?

A- I didn't write that and therefore I -- but I presume
that what they mean is a shorthand. A company quite
clearly cannot write.

Q- A company cannot write.

25 A- M.H. Gamma Consulting Limited is a company and it cannot

write.

Q- You mean like cats don't buy cat food, companies can't write. Come, come, Mr. Waterson. They're attributing this to M.H. Gamma Consulting Ltd.

5 A- Because M.H. Gamma...

Me IRVING:

My Lord, I believe that is what is misleading. On page forty-three (43), we have the word "adduced" and on page fifty-three (53), we have the word...

10 Me BAKER:

We have "provided".

Me IRVING:

... "provided". That doesn't necessarily mean that it had to have been written by Gamma. It's misleading to put those meanings to those words.

15

THE COURT:

Anyways, it goes to the weight to be given and credibility to be attached to Mr. Waterson. What is said there is said by somebody and it's not by the witness. The rest is weight of testimony.

20

Q- When did you write your expert's report?

A- As I've already said, I cannot remember with precision. It was written in portions throughout the -- I think you've quoted me as saying, earlier on this morning -- in the early part of nineteen eighty-eight (1988).

25

Q- Eighty-nine ('89), I think you meant.

A- I'm terribly sorry. Nineteen eighty-nine (1989).

Q- Yes.

5 A- But it has been modified, as I've tried to explain, and
it may well have been modified at several occasions
through the year.

Q- Now, did you send it to the Tobacco Institute of New
Zealand?

A- This expert statement?

10 Q- RJR-26?

A- My expert witness statement you're referring to?

THE COURT:

Yes.

Me BAKER:

15 Q- Precisely. At no time, as far as I remember, did I send
that to New Zealand, other than in this form, which
would -- in which it was sent by M. H. Gamma.

Me IRVING:

20 I think this form referring to the record is not going
to show...

A- This form referring to this report, report "X".

9/0042

Me BAKER:

25 Q- Well, we've been calling this as "X". We've been
calling it document "X", so actually -- well, we'll
produce it in a short while.

Now, you wrote this expert's statement and then you gave it M. H. Gamma?

5 A- No, as I explained to you, I was asked to write the entire critique and I did not have the time to write the entire critique. I explained that M. H. Gamma undertook to provide the critique. They undertook all the detailed econometric work which appears in the middle of this report. I provided them with various bits of help and I decided that I would accede to their request to write an appendix on the role of advertising in general because I already happened to have a convenient summary of the role of advertising in general...

10 Q- I see.

15 A- ...which was the expert witness statement. That went in there as that. It saved me a great deal of time and trouble.

Me IRVING:

"Went in there," referring again ...

A- To document "X" or "Y".

20 Me BAKER:

Q- When did they first ask you to write a critique?

9/0065 A- The document is dated here July nineteen eighty-nine (1989), so it must have been prior to that -- given the very very short time period which was available, it must have been July or June possibly, nineteen eighty-nine

25

(1989).

Q- So, wait a minute. You're saying that you wrote an expert witness statement and they asked you for a critique and you just used your expert witness statement as the critique, it became Appendix I?

A- Basically, yes.

Q- So, it's really not a critique then, of the New Zealand report?

A- Appendix I is not a critique of the New Zealand report. Appendix I is headed "The Role of Advertising," and is a simple attempt at describing how advertising works as in the expert witness statement.

Q- I see. Did the people who printed the final version of the New Zealand Report, New Zealand review, show it to you before it was printed?

A- No, they did not.

Q- You weren't worried about it. It had your name on it.

A- I simply assisted in the production of the critique. I wasn't aware of how it was going to be used.

Q- Were you paid for it?

A- I was not paid, I have not been paid for that report, no. I did it as...

Q- Have you sent them a bill?

A- I have not sent anyone a bill in conjunction with that report. I did it as part of my duties at the U.K.

Advertising Association.

THE COURT:

When you say that report, do you mean document "Y" or
"X"?

5 A- Document "Y" or "X" as you ...

Me BAKER:

Q- I would ask you, firstly, Mr. Waterson, to make
available to us at the earliest possible time all of
your drafts of the expert's report and particularly the
10 report which you gave to your counsel, which was in a
box in the courtroom in this courthouse on the first
(1st) of November, nineteen eighty-eight (1988), which I
have never seen.

A- That may be difficult because it may no longer be in
15 existence.

Q- No, I see your counsellors having a discussion over
there.

Me IRVING:

Well, may I make this suggestion, My Lord, we let the
20 request stand for the moment. We will, in my
submission, I would be entitled to object to that, but I
would like to take instructions on whether we will make
the objection under the circumstances. In view of this
particular line of cross-examination and the statements
25 Mr. Baker made to the Court earlier, we might not make

the objection. So, may I suggest for the moment we just reserve that issue and I will obtain instructions at noon as to whether we're going to raise any objection to the production of drafts.

5 Me BAKER:

Sounds fair.

Me IRVING:

So for the moment the witness can say, "yes, if I can," and we will...

10 Me BAKER:

Well, to make it practical as well as fair, if your instructions are to the effect that you're going to acquiesce to the demand would you be good enough to bring it with you this afternoon, if you are not going to make the objection and if in fact you do have the document.

Me IRVING:

If we have them.

Me BAKER:

20 I have it. Thank you.

Me IRVING:

I said, but if we have them, yes.

Me BAKER:

Yes.

25

9/0171

THE COURT:

So we'll leave it in suspense.

Me IRVING:

5

I take it, however, My Lord, that my friend is putting forwards as a proposition of law that expert witnesses can be asked to produce their drafts.

THE COURT:

Well, I understood you don't know if you're going to make an objection or not, so...

10

Me IRVING:

No, no, but I say I take it my friend apparently takes the position that witnesses can be asked to produce their drafts. I just want the record to show that.

Me BAKER:

15

If you're making that observation, Mr. Irving, so that you can ask our expert witnesses the same question, I can assure you that I've always adhered to the proposition that what's sauce for the goose is sauce for the gander. And you will use my request against me en temps et lieu.

20

Q- Now, I would ask you to look at your....

THE COURT:

Mr. Baker, if I understand one more time this expression I'm going to kill you!

25

Me IRVING:

Please say it once more!

THE COURT:

I just can't get that expression anymore. Find another
one!

Me BAKER:

Q- Take a look at paragraph two (2) of your expert witness
statement.

A- Right.

Q- I should tell the Court that you have uttered, albeit
with a smile, that last threat in the presence of a
senior member of my family to the extent that I could be
in trouble with you, you could be in dire trouble when
this hearing is over.

Now, Mr. Waterson, you wrote:

"Nor does the effectiveness of advertising
necessarily increase in proportion to the
amount spent."

A- That's correct.

Q- What does that mean? You wrote that yourself?

A- I wrote that myself.

Q- All by yourself?

A- All by myself.

Q- No help from Mr. Hagan?

A- No help from Mr. Hagan.

Q- Mr. Martin?

A- Or Mr. Martin.

Q- Or your secretary?

5 A- I can't vouch for that, she may have put one of the --
she may have changed something, but certainly I -- it
was I who articulated the thought.

Q- You, all right. So it's a thought. Is it based on any
kind of evidence or anything, or is it just a thought?

10 A- I believe, very strongly, having had considerable
personal experience of the effect of advertising and the
use of advertising, that one cannot even guarantee what
impact advertising is going to have at all. Doubling
the amount of advertising money you are spending,
similarly, can have no guaranteed impact.

15 Therefore, the amount to the effectiveness of
advertising, nor does the effectiveness of advertising
necessarily increase in proportion to the amount spent.
That would flow from those two thoughts, that whilst at
Guinness, for example, we spent a great deal of money,
20 we varied the amount of money -- I'm sorry.

Q- Yes, follow the Judge's pen, as Mr. Irving is so fond of
saying.

25 A- We varied the amount of money spent on advertising of
the various beers. At no time did we consider that
spending twice as much would necessarily bring in twice

as much sales or have twice the impact. It would simply be, in my view, foolish to assume that sort of direct linkage between advertising expenditure and result. It simply doesn't work that way in the real world, unfortunately.

5

9/0290

Q- Yes, the real world. Speaking of the real world, have you made any attempt to determine what the advertising expenditures were of Imperial Tobacco Ltd. and RJR-Macdonald in the last several years, say the last few years, going back ten (10) perhaps. Do you know what they are?

10

A- You're speaking in Canada?

Q- In this country, yes.

A- No, I've made no attempt to do that.

15

Q- You've made no attempt to do that.

And have you looked at any of the tobacco documents, the advertising strategy documents of these same two companies who you're testifying on behalf of today?

20

A- No, I have not.

Q- I see. And have you looked at the Canadian cigarette industry at all?

A- I've looked at total tobacco consumption in Canada as listed in the expert witness report I've provided the Court with, but that's ...

25

Q- That's all you've done?

A- That's it.

9/0334

Q- I see. You know where you said in your expert's report about the United Kingdom, I think in paragraph forty-one (41), page eleven (11)?

5

A- Yes.

Q- So you have a statistic of seven point five percent (7.5%) of an increase in real terms and you draw a conclusion because consumption has gone down twenty-eight percent (28%), I think you say, I no longer have the document in front of me, and you make the connection that somehow that where there's no advertising ban and the advertised consumption drops. You see, what I'm wondering, Mr. Waterson, and I'm getting to my question, is here you are testifying in a Canadian trial and you are, unlike Dr. Reid, who you watched testify a bit a few weeks ago, a professional numbers man. That's your job, isn't it? You go out and you get advertising expenditures and stuff like that.

15

20 A- That's correct.

Q- And you make use of those numbers and you sell or you give away for nothing, perhaps, the fruit of your labour, don't you?

A- Indeed.

25 Q- All right. So, so that you could testify in this trial,

could you tell the Court why you didn't bother to look at the numbers or attempt to get the numbers so your testimony might have some direct bearing as opposed to a matter of referring to other countries, for example, the U.K. which is where you come from -- and see we are in Canada, this is a Canadian trial, Mr. Waterson.

A- It's very difficult to draw, in my opinion, firm conclusions from any one set of analyses. So, for example, if I had tried to look at what was happening in Canada, I would need to have made an attempt at looking at health expenditures, at many -- the many many factors which might have affected Canadian tobacco consumption going back over many years. Having done that, which could have taken many months to do properly and a great deal of time and expenditure. Indeed, I would have had to have abandoned my job at the Advertising Association for that period. I would then have to sit down and analyze those data very carefully and would have no guarantee whatsoever of being able to come to any conclusion that would stand up in Court about what happened in Canada. I felt that it was much better to attempt what we call a cross-sectional study, which was to look at the impact of advertising across a variety of countries, using a variety of different data sources in order to show that the presence or absence of

advertising in general appears to be uncorrelated with whether or not advertising markets are going up or down.

Q- So therefore you are not interested in the amounts spent on advertising?

5 A- In Canada?

Q- In Canada?

A- I felt it was totally beyond the -- my capacities to investigate that, and indeed wasn't asked to.

10 Q- Turn to page sixteen (16) -- excuse me, page five (5), paragraph sixteen (16) of your expert's report, the one that begins "The most obvious reasons..."

A- Yes, I have it.

Q- The paragraph that begins with the words, "The most reasons..."

15 A- I have it in front of me.

Q- Now, do you have your -- you know, the Appendix I that we were looking at, and you could turn it...

A- Yes.

20 Q- All right. If you'll turn to page thirty-seven (37), I'll help you along a little bit.

A- Okay, I have it now.

Q- Now, you see, paragraph -- numbered paragraph sixteen (16) in your expert's report...

A- Yes.

25 Q- ...is missing from the -- page thirty-nine (39) that

you've got in front of you. You go...

A- I have page thirty-seven (37) in front of me.

Q- Well, I told you to have -- well, I have page
thirty-nine (39) open in front of me.

5 A- Okay.

Q- At the top of page thirty-nine (39), you see the words
"is spent"?

A- Yes.

Q- All right. Well, you see paragraph fifteen (15) on your
10 expert's report, which begins with the words, "There is
also evidence..."?

A- Yes.

Q- All right. And then you see in the third (3rd)
unnumbered paragraph from the bottom on page thirty-nine
15 (39)...

A- I see.

Q- ...the words "There is also evidence"?

A- Yes.

Q- You see those paragraphs are identical? Trust me, Mr.
20 Waterson.

A- Yes, yes. I do trust you, implicitly, Mr. Baker.

Q- Good. All right?

A- Yes.

Q- Good. Now, in your expert's report, page five (5),
25 number sixteen (16), there's a paragraph that begins,

"The most obvious reasons for supposing that generic advertising has little impact is the fact that there is...has little effect..."

Me POTTER:

5 "...impact..."

Me BAKER:

You're right.

10 "...little impact, is the fact that there is so little generic advertising anywhere in the Western world."

Did you write that?

A- If it's part of Appendix I, I certainly did, yes.

Q- No, no, we're reading from your expert's report.

15 A- I'm sorry. My expert's report. Yes, correct. I wrote it.

Q- Now, would you find that in Appendix I?

A- Are you -- you told me a moment ago that I was unlikely to...

Q- Right.

20 A- ...and if you have been through it, I would accept your word for it.

Q- Are you surprised by its absence?

25 A- Not at all. These papers get written and rewritten and changed over time, and on many occasions it seems suitable to eliminate one paragraph or the other for one

particular reason. I have no idea why that particular paragraph may have been left out of that particular report but, clearly, as one is writing, and writing for different audiences, these things do change over time.

5 Q- I see. Did you talk to Mr. Hagan about it?

A- Certainly not. I wrote the thing, as I've said, entirely on my own.

Q- Did you talk to Mr. Martin about it?

A- No.

10 Q- Are Mr. Hagan -- or Dr. Hagan and Mr. Martin officers of M. H. Gamma, do you know?

A- They are.

Q- They own M. H. Gamma?

A- I believe they own M. H. Gamma.

15 Q- I see. And they didn't ask your permission to take out a paragraph or two?

A- They certainly didn't do that. I'm positive of that.

Q- Are you offended that they have, now that you see that it's not there.

20 A- They wouldn't have taken it out. I would have taken it out.

Q- You took out paragraph sixteen (16) for them?

A- I'm sure that I wrote this, and that if I wrote this...

25 Q- When you say "this", what do you mean, so the record reflects what you mean by "this"?

10/0152

A- Appendix I of the report...

Q- Yes.

A- ...and therefore, if it is not there, it is extremely likely that it is I who deleted it.

5 Q- So you mean you edited your own work...

A- Oh...

Q- ...for another purpose?

A- It might conceivably -- yes, indeed, it might conceivably have been deleted by whoever compiled this entire report, but I find it and I believe it to be unlikely. If it has been deleted, it was very likely that it was I who deleted it.

10 Q- I see. So you did your own editing? Okay.

A- Now -- and then, you see, in your expert's report on page five (5), there's the numbered paragraph seventeen (17), and it starts with the words, "Attempting to modify consumer habits."

15 A- Yes.

Q- And that's the same as the second to last paragraph on page thirty-nine (39)...

20 A- I see that.

Q- ...of the main report, right?

A- Yes.

Q- Okay. But then there's something that's not deleted, there's something that's added.

25

THE COURT:

In where?

Me BAKER:

In the expert's report, paragraph eighteen (18), My
5 Lord.

"There are examples of long-running generic
advertising campaigns in declining markets.
For example, there have been lengthy campaigns
in the United Kingdom in both the egg and milk
10 markets."

A- Yes.

Me BAKER:

Q- Now, did you write that?

A- I wrote that.

15 Q- It wasn't Dr. Hagan?

A- It wasn't Dr. Hagan.

Q- And it wasn't Mr. Martin?

A- And it wasn't Mr. Martin.

Q- Right. Why do you think that this wouldn't be
20 applicable in an argument for the New Zealand Toxic
Substances Board -- I mean, after all, generic
advertising is generic advertising, and declining
markets, as you and your colleagues are fond of putting
it, are declining markets. They have eggs in the United
25 Kingdom and they have eggs in New Zealand, and they have

milk in the United Kingdom and milk in New Zealand. So what would be inapplicable about this paragraph eighteen (18) for this Annex C, you know, that got filed in New Zealand?

10/226 5 A- It is difficult to remember precisely. I am extremely busy...

Q- Take your time.

A- At that particular point in time, I was extremely busy. It may have been that I simply felt that the paragraphs as they stand reflected what I wanted to say quite adequately without that extra paragraph in it, and I would assume that is what I felt at the time.

10 Q- The little booklet that you brought with you that we've called "X"...

15 A- Yes.

Q- You saw that before? Before it went to New Zealand?

A- I saw that in its entirety before it went to New Zealand.

20 Q- I take it you're a man of a certain professional pride, Mr. Waterson?

A- Yes, indeed.

25 Q- And here we see on the title of that page, or the top page of that little booklet, which is virtually the same as the cover of Appendix C and the booklet I've shown you, the full report, three (3) people identified as

authors.

A- Yes.

Q- Why wouldn't you have just said, "Gentlemen, I wrote
this Appendix 1 all by myself." Why don't you just say
5 "M. J. Waterson wrote it"? I mean, isn't that the more
normal...

A- I don't insist on having my name on every single thing
that escapes from my word processor, and that I didn't
-- I must confess it didn't even cross my mind. As long
10 as my name was on the cover somewhere as being a part
author, I wasn't really worried about having every
paragraph that I wrote separately subheaded with my
name.

Q- M'hm. So it didn't bother you?

15 A- It didn't bother me at all.

Q- Now, there is a little minor change in paragraph
twenty-nine (29). Paragraph twenty-nine (29) at page
seven (7) of your expert's report. You see, in the
second sentence, you say...

20 THE COURT:

I'm sorry, I missed it.

Me BAKER:

Paragraphe numéro vingt-neuf (29), Votre Seigneurie, à
la page sept (7), deuxième phrase. Vous le voyez, Votre
25 Seigneurie?

THE COURT:

Hm, hm.

Me BAKER:

Le paragraphe commence "Normal brand advertising".

5 Okay.

Q- Now, Mr. Waterson, the second sentence starts: "For example, gasoline advertising". Do you see that?

A- I see that.

Q- Well, if you turn to page forty-one (41) of the appendix, you say for example "petrol advertising".
10 Now, Mr. Waterson, did you make that change yourself?

A- Mr. Irving actually suggested that on the basis that you would not be likely to understand "petrol" over here.

Q- When you say "you", are you referring to me or Canadians generally?
15

A- I'm sorry, Canadians generally.

Q- It's very kind of you to make that qualification, Mr. Waterson. Now, let's take a look at paragraph thirty (30). Did you write that all by yourself?

A- I wrote that all by myself, without any help from either Mr. Martin or from Dr. Hagan.
20

Q- Or from your secretary?

A- That I cannot...

THE COURT:

25 Paragraph what?

Me BAKER:

Thirty (30).

THE COURT:

Thirty (30).

5 Me BAKER:

Q- It's all yours?

A- It's all mine.

Q- Could you take a look at page forty-one (41) of the New Zealand document?

10 A- I see it.

Q- Second paragraph.

A- Yes.

Q- You see it?

A- Yes.

15 Q- It's sort of the same but not really the same.

A- Yes.

11/0091 Q- Perhaps you could look at both paragraphs and read them quietly to yourself and tell the Court why you made the change when you sent the thing off to Hagan and Martin, you know, the boys at M. H. Gamma, to send to New Zealand? Why that would have been significant for you to change?

20 A- I really don't know. It may have been that it was simply that it looked better without the extra bit in.

25 I don't believe it changes the sense of the paragraph

very much.

Q- That's your answer? You can't think of anything else?

A- I can't think of anything else.

Q- Just it looks better the way it is in the New Zealand
5 report?

A- Well, maybe it was amplified for the expert witness
testimony. I don't remember.

Q- Now, I'd like to draw your attention to paragraph
thirty-one (31) of your expert's report, at page eight
10 (8).

A- Yes, I have it.

Q- You are talking about generic advertising, are you not?

A- Yes, indeed.

Q- Hm, hm. And the last line of that paragraph thirty-one
15 (31) of your expert's report reads:

"In doing this, it takes no account of the
brands on sale within the market."

A- That is correct.

Q- Right. Now I'd ask you to look at page thirty-one (31)
20 -- excuse me, forty-one (41) of the New Zealand
document.

A- Yes, I have it.

Q- And there are some things in there that don't appear in
your expert's report. Right? For example, we see the
25 words:

"Effects of generic advertising can vary depending on the nature of the market and its objectives. It can stimulate demand either by:

5 a) Persuading non-buyers or users to try the product."

A- Yes.

Q- Right?

A- Yes.

10 Q- So that's not in the report?

A- That is not in the report.

Q- Yes. Did you write that?

A- I certainly wrote that, yes.

Q- Now, wouldn't it have been, when you're talking about
15 generic advertising and the effects of generic advertising, wouldn't it have been, as an expert, because you're offering your expert -- the benefit of your expertise and your past knowledge of generic advertising and all these things, more complete for you
20 to have put or left in your expert witness' report what you put into the New Zealand report, that, for example, one of the effects of generic advertising is to stimulate demand by persuading non-buyers or users to try a product? I mean, why did you leave that out?

8/0183 25 A- I remember why I left this particular bit out.

Q- Tell the Court, please, why you did.

A- Mr. Irving asked me to be particularly brief, as brief as I could be in the expert witness testimony. For the New Zealand report, there was no specific -- no specific size required for what I was writing. That bit, in fact, is going to go in, or was in, perhaps, a third document, which is the bones of the new monograph, called "Advertising and cigarette consumption," which I'm currently engaged in writing, and I believe that that I picked out because it seemed appropriate and there was no restriction on space. So, I believe that is why that bit went in there but not in there.

Q- Not in there and in there, you're...

Me IRVING:

What went in the appendix.

A- I'm sorry.

Me BAKER:

Q- I'm trying to pinpoint your "theres" for the record, but in any event I'm going to clarify it with you. So you're telling this Court that what you had originally written in respect of the effects of generic advertising, that it could -- it can stimulate demand, a) by persuading non-buyers or users to try the product, was taken out of your expert witness' report for this trial because there were constraints of space? That's

your testimony?

A- Mr. Irving asked me to keep this as brief as possible and since it didn't seem to add a great deal, I believe it was taken out for that reason.

5 Q- I put the...

A- Alternatively, if I may continue, it may have been that that is in the bones -- these things are all on a word processor, that that was part of the monograph that I'm currently writing and it simply seemed to be appropriate to put it in that particular space at that particular time. Looking at it, it -- I distinctly remember wondering whether or not it should go in. The reason is because it gives the impression that generic advertising can always, in other words, vary -- I'm sorry, it gives the impression that generic advertising has this power. A great deal of the testimony is given over to suggesting that it doesn't necessarily have this power, and I think that paragraph perhaps wasn't brilliantly written.

20 Q- But however unbrilliantly written it may have been, you wrote it...

A- Indeed.

Q- ... and you gave it to the O'Hagan people.

A- Indeed.

25 Q- And they published it and you deliberately took it out

of the report that you were filing for this Court?

A- I can't pretend to remember that it was that way about.
It may simply have been that I didn't think it was
appropriate in the first place to put it in the expert
witness report, but given the limitations on space that
I was striving to abide by for the expert witness
report, it is possible that that's the reason it didn't
go in.

Q- You have a limitation on space?

A- I didn't have a limitation. Mr. Irving simply said it
would be good if I could keep it as brief as possible to
avoid burdening the Court with a great deal of reading.

Q- Your curriculum vitae is longer than your report, Mr.
Waterson.

A- That's quite possible. I understood that it was
essential to have a curriculum vitae attached to it.

Q- Well, let's look at that paragraph thirty-one (31), you
know that you didn't -- you took out of the expert's
report because you were running out of space.

Me IRVING:

My Lord...

A- No, that is not...

Me IRVING:

Just a moment, please. My Lord, Mr. Baker has, in the

last few minutes, said: "You deliberately took it out of

the report". Mr. Waterson didn't say that and he didn't say what Mr. Baker just attributed to him. I wonder if Mr. Baker could just stick to what the witness actually said. He said that Mr. Irving, which is me, told him to keep it brief and he had done so. He didn't say he had suppressed something or deliberately taken it out. Why don't we just either not put previous statements to the witness, or put them correctly?

Me BAKER:

Firstly, My Lord, the witness did not say that it was Mr. Irving who told him to take it out to meet constraints of space. He said he was told to keep it brief and he took it out. I deliberately have not asked the question, because I'm not at all interested in what Mr. Irving may or may not have done or suggested to his expert witness. I think that that would be an inappropriate question for me to ask, but looking at this paragraph in the New Zealand document, see, it says that you can stimulate demand by persuading non-buyers or users to try the product.

Q- Now, do you believe that?

A- I believe that those, in theory, are the ways that generic advertising could work. In practice, I believe it doesn't actually do those things very successfully but there may well have been a case somewhere, sometime

when one or all of these things happened. I certainly wouldn't suggest that generic advertising has never happened.

5 Q- Now, looking at that same page forty-one (41) in the New Zealand document, you see, you have not just:

"a) Persuading non-buyers or users to try the product"

-- but you have b) and c) too. So -- also. So, let's look at b) for the moment, and b) is:

10 "Persuading existing buyers of all brands -- and there is a parenthesis -- to buy or use the product more frequently or in larger quantities."

Do you see that?

15 A- Yes, I see it.

Q- So that's the second effect that you're talking about in connection with generic advertising. And then the third is:

20 "Increasing buyers' perception of the value of the product."

You wrote that?

A- I did.

11/0334 Q- Right. And then did you read what follows:

"It cannot do all three at once."?

25 A- I did.

Q- But you didn't say "It can rarely do any of them", did you?

A- Not in this particular piece, no.

Q- No. Now, why didn't you, if that's what your -- if
5 that's what your philosophy or your understanding or your education or your discipline or your training or your research leads you to as a matter of opinion? Why wouldn't you have said that?

A- I believe that, somewhere in this report, I probably
10 qualified those statements.

Q- Well, maybe you could find where you've qualified those statements, Mr. Waterson. Take your time.

A- No, there doesn't appear to be a qualification in that paper.

Q- Now, I'm curious about something. Is it possible,
15 putting the best possible light on it, for you, Mr. Waterson, that you never wrote it originally and then you only wrote it just for New Zealand?

A- No, I definitely...

Q- Or wrote...

A- ...wrote the Appendix 1.

Q- You definitely wrote the Appendix 1?

A- As I've stated previously, I definitely wrote Appendix
1.

Q- And so -- so what we see on page forty-one (41) was part
25

of your original writing and it was deleted by you prior to your turning it over to the M. H. Gamma people, correct?

A- No, no, no.

5 Q- No?

A- This was part of the -- this is part of the report which I wrote and which I gave to the M. H. Gamma people to send to New Zealand.

Q- Yes, and you took it out for filing in Canada?

10 A- The Canadian report is a slightly different document. It may have been written prior to this one. It may have been written after that one. Whether or not I took it out -- I took it out certainly, it certainly didn't appear in the Canadian document because I felt it was
15 inappropriate or because there wasn't enough space. I don't have a vivid memory of why I deleted certain paragraphs and why I left others in. It would be asking a great deal, I think, of my memory to be able to tell precisely. The two (2) documents I wrote, in this one
20 clearly I felt, at the moment, at the time that it was appropriate to leave that paragraph in. For this document, I didn't.

Q- Well, perhaps the mystery will be resolved if your
25 counsel, or Mr. Irving, is instructed not to object, and they've retained a copy of the document that was

originally given last November.

By the way, you do say in that page forty-one (41) that it can stimulate demand by persuading non-buyers or users to try a product. So, how does that happen, how does it work when it does happen?

A- I have no evidence of a generic advertising campaign being splendidly successful or indeed successful at all. I am -- I would certainly not feel confident about suggesting that generic advertising has never worked. I'm confident that somewhere, at some period in time, there has been a generic campaign that has worked.

Q- It sounds to me, oh sorry...

A- All of the...

Q- ...I was interrupting, yes, I'm sorry Mr. Irving, I interrupted him again.

A- All of the evidence I have managed to acquire suggests that most generic campaigns don't work and that one (1) of the reasons why they're tried so rarely is because they are perceived not to work by manufacturers and advertisers collectively. So -- and these are theoretical conditions. Theoretically generic advertising can do these things. In practice, I have no evidence of them being able to do that.

Q- It sounds to me like you don't believe, then, very much in generic advertising?

A- Were it my money, I would not be interested in using generic advertising to sell a product.

Q- We are not talking about your money, Mr. Waterson, we are talking about your theory...

5 A- I don't...

Q- I am not finished.

A- I'm sorry.

Q- And what you have written. Now, if you believe so little in generic advertising, could you tell the Court why you would have written what appears on page
10 forty-one (41) in the language in which you have written it?

A- Because it is a -- it's a description of how generic advertising, in theory, can work. I have a great number
15 of different sentences, phrases and collections of words that appear on word processors. As I explained and as it states in the front of this document, there was remarkably little time to put this document together. I had a very, very short space of time. I would not claim
20 the document was perfect. I would not claim that it doesn't have faults in. Clearly, from my point of view, that paragraph should have a phrase to the effect that in theory generic advertising can do these things.

Q- Wait a second. I'm fascinated by something you've just
25 said. You just said you didn't have a lot of time to

prepare the document. I thought you prepared the document in January or January or February and...

Me IRVING:

My Lord, just a moment, Mr. Waterson was referring to Appendix 1 when he said that, as my friend knows.

Me BAKER:

Q- Wait a minute, you're referring to what when you said you didn't have a lot of time?

A- To the New Zealand document.

10 Q- The New Zealand document?

A- The New Zealand document which states in the front...

Q- But the New Zealand came from your document, didn't it?

A- Indeed, but it is, as you have seen, slightly different. It required editing, it required little time devoted to it and indeed, furthermore, other bits of the -- the report in question, which is much longer than simply Appendix 1, were written by me.

15 Q- Well, but let's stick to Appendix 1 for a moment. I -- what you have written on page forty-one (41), you know, the business of generic advertising in stimulating demand.

A- Yes.

Q- When was that written?

25 A- I have no idea. I've been writing about these subjects for many years. I have many different versions of many

different documents used for speeches, for publications of various sorts. I...

THE COURT:

5 But, Mr. Waterson, we are trying to make sense of what you're -- you're trying to say. You have prepared an expert report in the beginning of eighty-nine ('89), January eighty-nine ('89). If I see the introduction of Appendix C, you had some time between January and July
10 eighty-nine ('89) to provide some report. Now, the Toxic Substance Board that was -- that came out probably in the month of June, if I look at the introductory chapter.

Me BAKER:

It was May, My Lord.

15 THE COURT:

May?

Me BAKER:

Yes, May eighty-nine ('89).

THE COURT:

20 May eighty-nine ('89). Obviously it cannot be, it cannot have been written in eighty-eight ('88) if you -- if you prepared the expert report in January eighty-nine ('89) and sent part of it or rewrote part of it for the purpose of Appendix C. So it's got to be somewhere
25 between January and July eighty-nine ('89).

Me POTTER:

My Lord, the record is already clear that the time gap was much shorter than that. Mr. Baker has drawn your attention at Tab 5 of that document to a paragraph
5 saying that this document was commissioned on June sixteen (16) for delivery three (3) short weeks later.

Me BAKER:

But that's -- that's a gratuitous remark without meaning, Mr. Potter, because the witness has said that
10 what appears as Appendix A was written by him for the purpose of this Court and simply given to the M. H. Gamma people.

Q- Am I -- am I wrong in saying what I've just said, Mr...

A- You're wrong. It was edited by me. It was made into a
15 slightly different form. Other parts of the document that were sent to New Zealand were written by me at the same time. I had very little time to devote to it. I was in a great hurry but I did use a great chunk of the work that was in the...

20 Q- Other...

Me IRVING:

In the -- let him finish.

A- In the expert witness testimony fairly obviously.

Me BAKER:

25 Q- We'll get to the other parts of the New Zealand document

that you've written that don't appear in the -- in Appendix 1. But we were talking, and we have been focusing, on Appendix 1. That is your writing, correct?

A- That is my writing.

5 Q- And that was done in early nineteen eighty-nine (1989), for the purpose of this trial, right?

A- My expert witness testimony, as far as I remember, was written around that time. It may have been that a large portion of it was written before that time...

10 Q- Right.

A- ...because of the earlier November date for the Court hearing.

Q- Right.

15 A- I find it difficult, I'm terribly sorry, but I do find it difficult to be absolutely precise about when these documents were written.

Q- But the point is, in connection with what we find on paragraph -- in paragraph, excuse me, page forty-one (41) of the New Zealand answer. You said you didn't
20 have an awful lot of time. So my question to you is: is that something that was written in the summer of nineteen eighty-nine (1989) or was it something that you wrote early in nineteen eighty-nine (1989) as part of the report which we filed, Exhibit RJR-26, but you took
25 out, at some point when you decided to file the report

in the end?

A- I really don't know. It may have been part of a third or a fourth document because I have many documents of this sort. I really cannot remember precisely why that one (1) was left in there. It may have been, as I indicated, that Mr. Irving had indicated to me that I should be brief for the expert witness testimony and therefore this was deleted from an original or an earlier version.

Q- Given your lack of belief in the entire issue of the benefits and purposes and the effectiveness of generic advertising and given the fact that it is in this document, New Zealand document at page forty-one (41) and not in your expert's report, are you prepared to testify affirmatively under oath that you wrote that and that, in fact, it wasn't written by somebody in New Zealand like Mr. Hagan or Mr. Martin?

A- I am prepared to affirm that I wrote that and that Mr. Hagan and that Mr. Martin and no one in -- or anyone in New Zealand -- had anything whatsoever to do with it, that this document was entirely my own work.

That is not to say, to add one small rider to that, that my writing is entirely my own work in toto. Odd phrases and paragraphs inevitably creep in from previous writings, from sentences that one picks up from other

writings in previous years that gently filter through and are changed in small manner. In other words, most people in my sort of occupation tend to paraphrase what other people have said years ago. It's obviously a very common phenomenon.

I cannot testify that I was the originator of that. I can testify, absolutely and completely, that no one in New Zealand, or Mr. Martin or Dr. Hagan, had anything to do with that paragraph, or indeed with the rest of Appendix I.

Q- Do you think that -- I'm putting this question now to you as an expert, as you're here as an expert, and in fact you qualified yourself as an expert, and Mr. Irving has put a variety of questions to you. You've done an awful lot of writing, and you've testified all over the world, and you work for the U.K. Advertising Association and all those things.

So here we are in a Canadian court, and we have to have a judge who someday is going to have to make up his mind about what all of this stuff means, Mr. Waterson, so I put the following question to you: Would you believe that a Court would be better informed on the subject or less well informed by the absence or the inclusion of that phrase at page forty-one (41), which is absent from your expert witness' report, which you

say you wrote?

5 A- From the purposes of the judge making up his mind, I don't really think that it is terribly material, because I go on to say that even in the instance of generic advertising working -- even if one assumed it would work -- it is still quite different from the collective actions of individual brand advertisements. I don't believe that individual brand advertising will accidentally have the same impact as generic
10 advertising. I furthermore believe that generic advertising, which is advertising deliberately aimed at doing these things, at shifting whole markets -- I don't believe that there is a great deal of chance of generic advertising working, for the reasons I've outlined in
15 the expert testimony. Therefore, I believe that that paragraph is largely irrelevant to the expert witness statement.

Q- Well, what are the reasons that generic advertising doesn't work?

20 A- Because people are not cyphers, and because attempts to make them smoke more or drink more are much more difficult than attempting to get them to switch brands.

Q- Okay. If I could -- I'm...

A- It is inevitably more difficult to get teetotalers to
25 become drinkers than to get current drinkers to drink

Molson's.

Q- Good. Now, when you say "smoke more", have you ever seen an ad anywhere in the world that said "smoke more"?

A- I don't believe I have, no.

5 Q- M'hm. What do you think would happen in the United Kingdom if one of the companies tried to do an ad that said "smoke more"?

A- It would certainly not be allowed under the advertising regulations.

10 Q- And what do you think would happen -- well, you don't know about this country. Do you know about other countries?

A- I would assume that in most Western countries such a campaign would not be allowed.

15 Q- Right. So, you talked a little bit about behaviour. Do you know much about behaviour?

A- Not in the specialist advertising sense.

Q- I beg your pardon?

A- Not in the specialist advertising sense.

20 Q- What do you mean by that, "in the specialist advertising sense"?

A- Well, there are many books and references that refer to the impact of advertising on behaviour. Those which I have read tend to group around one particular aspect of this, which is the difficulty of getting people to shift
25

attitudes, and the much greater difficulty of getting them to shift -- change behaviour patterns.

Q- As an expert...

A- There is...

5 Q- Whoops. I did it again.

A- There is a great deal -- there is a great deal more academic literature on the subject, some of which Dr. Reid referred to...

Q- Yes.

10 Q- ...and I have not read that. I have only read reviews and summaries of those pieces that are referred to in this testimony.

Me BAKER:

My Lord, it's almost twelve thirty (12:30)...

15 THE COURT:

Yes, I was going to interrupt you.

Me BAKER:

... and I noticed you were about to interrupt me, so I'll interrupt myself, and suggest that we break.

20 THE COURT:

Two fifteen (2:15)?

LUNCH ADJOURNMENT

In the year of Our Lord, nineteen hundred and eighty-nine
(1989) on this thirty-first (31st) day of the month of
October, PERSONALLY CAME AND APPEARED:

5 Me COLIN K. IRVING

on behalf of Petitioner, RJR-Macdonald Inc.

Pour la requérante, RJR-Macdonald, Colin Irving et
Georges Thibaudeau.

Me SIMON V. POTTER

10 on behalf of Petitioner, Imperial Tobacco Limitée

Et pour Imperial, Simon Potter, Lyndon Barnes et Pierre
Bienvenu.

Me ROGER E. BAKER, Q.C.

on behalf of Respondent

15 Pour l'intimé, Roger Baker, Claude Joyal et Paul
Evraire.

In the year of Our Lord, nineteen hundred and eighty-nine (1989), on this thirty-first (31st) day of the month of October, PERSONALLY CAME AND APPEARED;

5 MICHAEL WATERSON,

WHO, having been previously sworn, doth depose and say as follows:

10 CROSS-EXAMINATION BY Me ROGER V. BAKER, Q.C. (Contd)
on behalf of Respondent

Q- Mr. Waterson, have you ever read the report from New Zealand called, "Health or Tobacco, An End to Tobacco Advertising and Promotion, Toxic Substances Board, New Zealand, 1989"?
15

This is, My Lord, the report that was produced in May and which has been filed as Exhibit 176 as part of the Respondent's extrinsic material.

A- Yes, I have.

20 Q- You have read it?

A- I have read it.

Q- When did you read it?

A- Again, I'm afraid I don't have accurate notes on these things. I was shown it very shortly before I put
25 together the parts of this document that I read --

wrote. So if this was May eighty-nine ('89), it would have been somewhere between May, eighty-nine ('89), when the T.S.B. report came out and July, eighty-nine ('89), when the critique was published, I believe. Yes, July.
5 So it would have been between May and July.

Q- Who actually asked you to do a critique of the Toxic Substance Board's Report?

A- I was originally asked...

Q- We'll -- for frame of reference, we'll call it the New
10 Zealand report, if you don't mind.

A- The New Zealand report.

Q- Yes.

A- I was originally asked to do it by, I believe, it was -- it was certainly either British American Tobacco or an
15 executive of British American Tobacco or Rothmans. I forget which of the two actually asked me to do it. Certainly a large English tobacco company, British tobacco company, asked if I would be prepared to write a critique of the report.

Q- When would that have been -- that request have been
20 made?

A- It would have been sometime after the publication of the T.S.B., the New Zealand Report in May and prior to the publication of this in July. Given the very short time
25 schedule and looking at the note in the front...

Q- The note in the front of what?

A- I'm sorry, the note in the front of the -- of my review or the review produced by M. H. Gamma. This says that the report was commissioned on June the sixteenth (16th). I was -- I must have been approached therefore between May and June the sixteenth (16th).

5

Q- Now, when you were approached were you given the report at the time that you were approached?

A- I was given a photocopy of the report.

10

Q- Yes. Yes. So you were given a photocopy of this New Zealand report...

A- Yes.

Q- ...Exhibit 176.

A- Yes.

15

Q- Now, were you at a meeting or was this done over the telephone or did somebody communicate with you in writing saying, "Dear Mr. Waterson, would you help us and would you write a report," or how exactly was it done?

20

A- I was telephoned and subsequently sent a copy of the report and asked to put together some notes on the reports.

Q- Right. Now, did you tell them, whoever it was you were talking to, whether it be to B.A.T. people or the Rothmans people, that as luck would have it, you've

25

already written something that would suffice quite nicely...

A- No, no, no.

Q- ... as a part of the rebuttal that they were asking you to do?

A- The initial approach was to write a critique of chapters, I believe, six (6), seven (7) and eight (8) -- the chapters of the document, the New Zealand document concerned with advertising, and it would not have been enough to simply put together the Appendix 1 of the document which was simply a review of the role of advertising. What they required was a full analysis of chapters six (6), seven (7) and eight (8) of the New Zealand Report.

Q- So Appendix 1 is only part of that?

A- Appendix 1 is just part of that.

Q- Did you tell them, however, that you'd already done Appendix 1 and that would shorten things or quicken things up a bit?

A- No, I first of all read the document, or at least read it briefly, I didn't read it every word. I took the document home and read it quickly, briefly, to determine precisely what kind of work was necessary, and I initially wrote a two (2) or three (3) page letter summarizing my views on the report, then stating that a

full-scale review was in my opinion called for to properly critique the report. That was my initial reaction.

Q- Did you ever tell the people from M. H. Gamma, I mean ultimately I gather people from M. H. Gamma got in touch with you, Dr. O'Hagan and Mr. Martin?

A- No, the sequence of events was I was contacted by the tobacco company, I read the report quickly, produced a two (2) or three (3) page report on what I thought were some essential faults in the report and a recommendation that a much larger critique should be commissioned. I did not have the time to do or produce that critique and I suggested that M. H. Gamma, a company whose services I'm aware of, should be commissioned to produce that report. M. H. Gamma were subsequently commissioned, I then met with Dr. Hagan and Mr. Martin and we agreed that I, because of my great shortage of time, I would contribute portions of the analysis of chapters six (6), seven (7) and eight (8). I would expand slightly on some of the portions that I had made clear I was worried about in my initial letter and I would also supply them with the Appendix 1, the role of advertising which I would review from material I had on hand and produce for them.

Q- Now, what did you tell them, exactly, about Appendix 1?

You told them it was extant?

A- They are very -- both -- certainly Dr. Hagan is very familiar with my work and knows that I've written and spoken repeatedly on this subject and that it would not be difficult for me to produce a review of the role of advertising. He was not aware, I believe, from memory, of the detail of the work that I had then undertaken for this Court, but he was certainly very familiar with the previous paper, "Advertising and Cigarette Consumption," and a number of other papers that I'd written on the subject.

Q- Did you ever tell Dr. -- is it Hagan or O'Hagan?

A- It's actually Hagan.

Q- All right. Did you ever tell Dr. Hagan that you in fact had created a report for the litigation in Quebec and that Appendix 1 was more or less that report?

A- I -- after we had proceeded for a -- talking about how we should proceed, I in fact suggested that Appendix 1 would neatly -- would be very easily and quickly produced by myself and would fit neatly into the total critique.

Q- That was not the question I asked you, Mr. Waterson. The question is: did you tell Dr. Hagan that you had already created a document for the Court in Quebec and that that was effectively what you were calling Appendix

1 in the Independent Scientific Review?

A- I cannot recall the precise form of words that I told Dr. Hagan, but it would have been of the sort that I had already done a great deal of work, of which he was aware, and that this work was in the process of being updated on a fairly continuous basis, both for the proceedings in Quebec and, indeed, for the next issue of the next version edition of advertising and cigarette consumption, the forthcoming document. He was, therefore, appraised of the fact that I could produce an appendix very quickly.

Q- Mr. Waterson, I have no doubt that you can produce an appendix very quickly. The question is, did you or did you not tell Dr. Hagan that Appendix 1 was virtually the same as the report you had filed with the Court or were about to file with the Court in Quebec? Yes or no?

A- He was certainly aware that with minimal changes I could produce something called Appendix 1, as agreed, to fit into this critique.

Q- Does Dr. Hagan know that you have filed a report in Quebec which is virtually the same as Appendix 1 in 'The Independent Scientific Review,' yes or no? And please don't answer for the fourth time: "He's aware that I could do it".

A- I believe he is aware that I have filed a report very

similar in nature to the one that has gone into the New Zealand report.

Q- How was he made aware of that?

A- Because we had many conversations on the subject.

5 Q- Hm, hm. Did he offer you payment?

A- No, because I explained to him that I felt I could not take responsibility for the production of the whole report. I could merely oversee it and in that sense, it was not justifiable for me to charge for the thing and
10 it was just part of my normal A. A. function to do that kind of report.

Q- Can you not take responsibility for the entire Appendix 1, Mr. Waterson? I thought that was yours and not theirs?

15 A- Appendix 1 is mine and not theirs, and I am prepared to -- I could not take responsibility for producing the entire critique because I didn't have the time.

Q- We're not talking about the entire critique. We're talking about Appendix 1 of Appendix C. That is yours
20 and yours alone, is it not?

A- That is mine and mine alone.

Q- Were you surprised when you read the New Zealand report that...

A- The -- I'm sorry.

25 Q- Were you surprised when you read the New Zealand report,

that the report that you had created for the litigation in Quebec, which is in this courtroom as Exhibit RJR-26, was sufficient to suffice as the rebuttal to the New Zealand report equally?

5 A- I'm sorry, could you repeat the question?

Q- Well, you say that RJR-26 is something that you wrote, having been requested to write an expert's report by Mr. Irving, or whoever on the other side of the table, for this court case. Correct?

10 A- I have written the expert witness for this court case, this -- yes, this document.

Q- RJR-26.

A- Expert witness statement of myself, yes.

Q- Right. And Appendix 1 of the Independent Scientific
15 Review purports to be an answer, in part an answer to the New Zealand report, correct?

A- Appendix 1 is a small part of the answer of the critique of the New Zealand report. It in no sense constitutes a total rebuttal of it.

20 Q- Hm, hm. I would invite you to look at your paragraph forty-three (43) at page eleven (11) of your expert witness report.

A- Yes, I have it.

Q- Do you know if that's repeated?

25 A- Offhand I don't, I'm afraid.

THE COURT:

Pardon?

Me BAKER:

He said: "Offhand I don't know, I'm afraid".

5 Q- I have found that it is repeated with a slight change
and you'll find it at page forty-three (43) of the
Appendix 1. Do you have it in front of you?

A- I have it. I have it now, yes.

10 Q- They're sort of -- they're pretty much the same,
wording's changed a little bit. In your expert's
report, you call it "a series of studies", Appendix A;
in the New Zealand Appendix 1, it's called Appendix 4.
Correct?

A- Correct.

15 Q- Now, let's turn at page Appendix A of your expert's
report and you'll recall that you referred to it briefly
yesterday. You remember, that was the article of this
person, Smart ...

A- Yes.

20 Q- ... and then you cited some stuff from the Federal Trade
Commission.

A- Yes.

Q- In fact, if you look at the New Zealand appendix, it's
really Appendix 3, isn't it?

25 A- It is, yes.

Q- Okay. Now...

THE COURT:

When you say "the New Zealand Appendix", do you mean the
"Y" document?

5 Me BAKER:

Yes. C'est à la page quarante-neuf (49), Votre
Seigneurie.

THE COURT:

Okay. Why don't you -- since I understood you wanted to
10 file those, why don't you file them now, so we could
refer -- if you intend to.

Me BAKER:

I do.

THE COURT:

15 So that we could at least refer by num -- or in my
notes, refer by numbers. It's much easier than...

Me BAKER:

20 Fine. Good. We'll then file the Independent Scientific
Review of the May nineteen eighty-nine (1989) Toxic
Substances Board Report, commissioned by the Tobacco
Institute of New Zealand. I would recommend, My Lord,
so that it be in connection with the New Zealand Review
itself, which has already been filed as 176, that this
be filed as 176-A.

25

Me POTTER:

I think we're going to have a problem, My Lord, because that, the 176 appears in a list of documents which begin with numbers which we've already used in these
5 proceedings. If it's AG-176 on that same list as an AG-1 which we've already seen, I have no objection to it having any number really. I just want to avoid confusion later on. It may be that in that list, as well, are things which will not end up being filed as
10 exhibits. The only one that is really admitted as an exhibit now is this one.

Me BAKER:

Actually it doesn't matter. I mean, where are we in the exhibit list?

15 THE CLERK:

AG-59.

Me BAKER:

59 déjà?

THE CLERK:

20 Oui.

Me BAKER:

Then let's file it as AG-60.

THE COURT:

AG-60.

25

Me BAKER:

60?

THE CLERK:

Le prochain, c'était...

5 Me BAKER:

Le prochain, c'est 59? Alors 59.

THE COURT:

And that corresponds to the "Y" document you had
annexed...

10 Me BAKER:

That is correct.

THE COURT:

Okay.

Me BAKER:

15 That is correct. This is the "Y" document.

Q- All right. So in your expert's report, your Appendix A
has two (2) citations.

A- Yes.

Q- You have this article by Smart and the Federal Trade
20 Commission.

A- Yes.

Q- Right?

A- That's right.

Q- Now, those references in Appendix A of your expert's
25 report are filed for what purpose? To prove the

proposition that advertising doesn't make consumption grow?

A- Not to prove the proposition, to suggest that completely independent persons with whom I have no contact have come to that conclusion...

Q- Hm, hm.

A- ... after examination of substantial numbers of texts.

Q- Hm, hm. Are you familiar with the work of Mark Albion and Paul W. Harris?

A- Yes, I am.

Q- Very familiar with it?

A- I have read the book "The Advertising Controversy" some years ago.

Q- Hm, hm. And are you familiar with the book of Chiplin, Sturges and Dunning, "Economics of Advertising"?

A- Yes, I am.

Q- And what does that say, more or less?

A- It says:

"The causal relationship is still a matter of controversy but careful research has suggested that any causal effect is rather weak. Thus it seems to remain unproven that advertising has led to any marked increase in aggregate demand in general."

Q- I see you're reading from...

A- I'm sorry, I'm reading from...

Q- Yes, you're reading word for word almost from...

A- Yes, from the appendix.

5 Q- ... from the appendix. Now, is Chipman -- Chiplin's book, "The Economics of Advertising," important in dealing with demand -- advertising and aggregate demand?

A- It is a book of -- it is one of the few books which I would regard as having had a serious look at the subject of the economics of advertising in the U.K.

10 Q- I see, and does it prove the proposition which you would like to be able to demonstrate, that advertising doesn't make consumption grow, it has no effect on aggregate consumption?

A- I don't believe it's possible to prove the proposition.
15 It indicates strongly that it is unlikely to be a factor causing a major growth in either tobacco or drink markets.

Q- Is the book "Economics of Advertising" by B. Chiplin and B. Sturges and J.H. Dunning a highly regarded textbook?

20 A- I regard it highly. I don't know how it is regarded in other circles. I do believe it is one of the very few books on the British market that deals with the subject adequately.

Q- I see. Then why wouldn't you have put that in Appendix
25 A of your expert's report? You see, it's in the report

for New Zealand but it's not in your expert's report and I don't understand that, if it's such an important book. Why wouldn't you have our Court have the benefit of this great tome?

5 A- I have a very very long list of references which I use for different purposes, which I maintain continuously on a word processor. I select from those references those which I think appropriate.

Q- Hm, hm.

10 A- Mr. Irving stated quite clearly to me that he felt that a great long list of literature, of individual pieces of literature, would probably not be of much consequence and suggested that I should keep the length of the document down. I therefore felt that to keep -- rather
15 than put in a half or a quarter or two thirds of the references, it would be simply better to confine myself to those two (2) references which are regarded as completely independent and also widely embracing through having reviewed a great number of other studies.

20 Q- Which -- what's widely embracing?

A- Well, for example, Mr. Smart's article, I believe to be extremely widely embracing. I believe that anyone who has read Mr. Smart's article couldn't fail to conclude that he was both independent and immensely thorough in
25 arriving at his conclusion that advertising bans do not

reduce alcohol sales.

Q- So you simply determined in -- with a view to shortening
the length of your paper, that Smart's article on
alcohol would be more appropriate for this Court in
5 understanding the problem than this highly regarded
textbook on the economics of advertising by Chiplin,
Sturgess and Dunning. Is that correct?

A- I felt if I was going to put in Chiplin, Sturgess and
Dunning, which does not incorporate a very large
10 literature search, I would really have to put in many of
the other references which appear on my very lengthy
list, which is in fact substantially larger than the one
which appears in the New Zealand report. If I was
therefore to keep the testimony for this Court
15 relatively short, it would be simply better to put in
two (2) references that covered a very wide ground...

Q- M'hm.

A- ...and were very clearly independent.

Q- In Appendix A, did the Chitlan book originally appear
20 and then was it subsequently deleted?

A- I don't remember, I'm afraid. These documents do go
through many revisions. It may be that in one (1) of
the original revisions, a very large proportion of my
complete list of relevant literature appeared, but I
25 cannot testify to that effect.

Q- Do you know if your original report is in the courtroom?

A- I don't.

Q- You don't. Then perhaps Mr. Irving could help us...

Me IRVING:

5 Yes, I'd be happy to.

My Lord...

Me BAKER:

Well, it must be dangerous, if he's happy.

THE COURT:

10 Proceed.

Me IRVING:

Of course, we had some time available over the lunch
hour, My Lord -- I guess we can all take note of the
time differential between here and London, so we talked
15 to Mr. Waterson's office. I looked in my own office.

Now, what I have found so far -- and I would like
to reserve my comments on other documents until I
actually see them, which will probably be tomorrow
morning -- I have found, and would be very happy to give
20 to Mr. Baker, the original piece of evidence which was
filed with the Court for the hearing which was scheduled
for last November.

That clearly is not a draft, and I don't think that
any privilege would attach to it. We were prepared to
25 proceed to trial with that witness statement for Mr.

Waterson. Your Lordship actually had it, although I understand it was never opened and it was returned when the Court of Appeal interfered with the process of this trial.

5 THE COURT:

Schedule. The schedule.

Me IRVING:

Sorry.

Me BAKER:

10 Interfered.

Me IRVING:

So that, for the moment, the only document I have which will help my friend is the original witness statement by Mr. Waterson.

15 I may say I have another draft, a subsequent one, which is a working draft with my own notes on it which I am not prepared to put in. But this document was intended for the Court, and I have no objection to Mr. Baker looking at it. I'll give it to him right now. I
20 have left off the c.v. What was filed with the Court was the statement and a c.v. which is more or less the same one as has been filed, and I have copies made without the c.v. attached to it for the moment.

25 Now, if my friend wants me to hand it up to the judge, I will.

16/121

Me BAKER:

No.

Me IRVING:

I thought not. But I am going to hand a copy to Mr.
Waterson, so that he...

Me BAKER:

It's not that I'm trying to deprive you of the pleasure
of reading the document, My Lord. I have no idea what's
in it, and whether I'm going to put any questions on it.
I'll have a look at that in a while.

Q. Now, back to the literature search on page forty-nine
(49), Mr. Waterson, of AG-59, as I'm going to call this
New Zealand reply document, okay?

A- Of what page? Fifty-nine (59)?

Q- Oh, sorry, forty-nine (49). At the back. I see, when
you flip the page, U.S. Federal Trade Commission,
Bureaus of Consumer Protection and Economic Study,
nineteen eighty-five (1985).

Why did you go back to nineteen eighty-five (1985)
for your references?

A- It's very difficult to find references which I believe
can be thought of as wholly impartial. There are quite
a lot of works in this area, but some of them are
clearly written by people who have very firm views on
either one side or the other, and they omit certain

reports that are not favourable to their cause, or they are not thorough in looking through the literature extensively.

5 I simply felt that the U.S. Federal Trade Commission, which has had a great deal of experience of regulating cigarette advertising, has been very hostile to cigarette advertising at certain times, could not really be thought of as anything but impartial in this context, and therefore provided a very good and useful
10 conclusion of surveying the literature.

Q- So your view is, then, that people who have very strong views tend to edit out what it is they think they may not like, and therefore exclude those...

A- It's not always the case that they do it deliberately.
15 They can either do it...

Q- Inadvertently?

A- ...inadvertently, sometimes they do it deliberately, quite clearly. Another problem is that if you are, for example, working in the health education sphere, it may
20 be that you're unfamiliar with the economic literature.

Q- M'hm.

A- Conversely, someone familiar with the economic literature may not be wholly familiar with documents that have appeared in quite different spheres, such as
25 the medical literature or the health education

literature.

Q- I see. Very strong views. Tell me, or tell the Court, Mr. Waterson, do you have very strong views on the subject?

5 A- Having worked in the advertising industry, and prior to that in the drink industry, I do have strong views on the subject. I believe very strongly that the views that I have advanced are correct ones and supported by independent evidence.

10 Q- We will be examining that shortly.

THE COURT:

I'm not sure I understood what you said about the F.T.C. report of eighty-five ('85).

15 The question was why eighty-five ('85)? Why not eighty-six ('86), eighty-seven ('87) and eighty-eight ('88).

A- The F.T.C. report was written, My Lord, in nineteen eighty-five (1985), and they haven't -- I don't believe they have produced one since that time.

20 THE COURT:

Oh, okay.

BY Me BAKER:

Q. This is the March, nineteen eighty-five (1985) document -- it's the thing you gave us yesterday?

16/264 25 A- Yes. That is correct.

Q- Well, this is the document you gave us yesterday...

A- That is correct.

Q- Okay, good. The big document from which was taken these few...

5 A- That's correct. The few particular...

Q- ...quotes in your...

A- Correct.

Q- And you're saying that what you like to do is take reports from impartial authorities, where you know
10 you're on safe ground and they can't be challenged for their partiality. Is that correct?

A- I think it's preferable, if one is trying to establish what is the true nature of events.

Q- Now, let's see if I have the same piece of paper in my
15 hand that you have in front of you, that you gave us yesterday, that you say those quotes came from. Does the top page read "Recommendations of the Staff of the Federal Trade Commission"?

A- It does, indeed.

20 Q- And then, just below that, it says "Omnibus petition for regulation of unfair and deceptive alcoholic beverage advertising and marketing practices"?

A- Yes.

Q- Same one? Docket number two oh nine dash forty-six
25 (209-46)?

A- That's the one.

Q- March, nineteen eighty-five (1985)?

A- Yes.

Q- There's a note just below that?

5 A- Yes.

Q- Read it for the Court, would you, please.

A- "These recommendations reflect the views of
the Commission's Bureau of Economics, of
Consumer Protection and Economics. They do
10 not necessarily represent the views of the
Federal Trade Commission or any of its
individual commissioners."

Q- I see. So what you quoted in your Appendix A is not a
report of the Federal Trade Commission, is it?

15 A- Of the staff of the Federal Trade Commission Bureau of
Consumer Protection and Economics.

Q- I see you're familiar with the highways and the byways
and the regulations of the Federal Trade Commission, are
you, Mr. Waterson, such that you can make the
20 distinction?

A- I have visited the Federal Trade Commission.

Q- You've been in the building, you mean?

A- I have been in the building, and I have spoken to
various people at the Federal Trade Commission. I could
25 not guarantee to tell you precisely...

Q- M'hm.

A- ...what the Bureau of Consumer Protection and Economics is, but I did state clearly in my references that it was the Bureau of Consumer Protection and Economics...

5 Q- M'hm.

A- ...which undertook the study and concluded -- I didn't say it was the Federal Trade Commission itself that had done it.

10 Q- M'hm. So then this isn't really a formal report of anything. This is just a study of...

A- It is -- sorry, it is the recommendations of the staff of the Federal Trade Commission, as it says at the top of the piece of paper. It can also be supported by papers that I have written by the head of the Federal Trade Commission.

15 Q- You have papers written by the head of the Federal Trade Commission?

A- I do, indeed.

20 Q- Well, you must have a lot -- can I see some of them, please?

A- Yes. Here is one...

Q- Oh, thank you.

25 A- ...very important one, a statement of Daniel Oliver, Chairman of the Federal Trade Commission, on cigarette advertising bans. There are some very interesting

pieces outlined in there.

16/338

Q- I have it, yes. Could you hand that over, please?

If this is so important, why wouldn't you put it in your Appendix 1?

5

A- Because, as I said, we felt -- or I felt, that it was very simply better just to put in one (1) or two (2) simple references which covered a number of other studies, rather than attempting to put in a completely comprehensive and possibly very large review.

10

Q- But it's even more up-to-date than the other one. You see, this is April three (3), nineteen eighty-seven (1987). I mean, here you have something by the Chairman of the Federal Trade Commission, and you don't put that in. Why not?

15

A- The Chairman of the Federal Trade Commission has not personally conducted a literature review, whereas the Bureau of Consumer Protection and Economics had undertaken a survey of the literature review. That is a document with the views of one man in it, albeit a very experienced gentleman.

20

Me IRVING:

My friend doesn't want to put this in, I take it?

Me BAKER:

I will let you know when I do.

25

Me IRVING:

Good.

Me BAKER:

Do that.

5 Do you know all about what happened in Norway,
about the time of the ban?

A- I'm sorry, do I understand what happened in Norway?

Q- In Norway about the time of the ban in nineteen
seventy-five (1975).

10 A- I believe very thorough efforts were made to cut tobacco
consumption, the object of the exercise being to create
a no-smoking generation. Accordingly, they instigated
considerable and large health education campaigns,
raised the price of tobacco and banned entirely
15 advertising.

Q- Now, do you know a lot about Norway?

A- I don't know a great deal about Norway the country.

Q- Do you know a lot about the people of Norway, the
culture of the country?

20 A- No, I don't.

Q- No. About the habits of the people in the country?

A- No, I'm afraid I'm unfamiliar with them.

Q- Kinds of things Norwegians do, the kinds of things
Norwegians read?

25 A- I know they have an advanced and modern press system of

the kind that we have in most of Western Europe, but apart from that, I'm afraid I don't.

Q- So, for example, do you know whether in Norway there was billboard advertising of cigarettes prior to nineteen
5 seventy-five (1975)?

A- I am not aware of whether there was or wasn't.

Q- Do you know whether there was a lot of magazine advertising for cigarettes prior to nineteen
seventy-five (1975)?

10 A- I don't know.

Q- M'hm. Do you know if there was a lot of point of sale advertising for cigarettes prior to nineteen
seventy-five (1975)?

A- That I do not know either.

15 Q- M'hm. In fact, you don't know very much about Norway, do you, Mr. Waterson?

A- I do know that advertising of cigarettes was not banned prior to nineteen seventy-five (1975) and was banned subsequently and that consumption of cigarettes has
20 fallen only slightly in Norway, whereas it has fallen very considerably in many other countries, without an advertising ban.

Q- M'hm. You can't tell the Court, then, whether in fact the advertising, the extent of advertising in Norway
25 prior to nineteen seventy-five (1975) was marginal, do

you?

A- I don't know that, no.

Q- You do not know that. As a hypothesis, Mr. Waterson, if
it were or had been marginal then a ban would have
virtually no effect if there had been very little
advertising prior to the ban, isn't that correct?

A- I don't think a ban would have any impact at all on
total sales anyway.

Q- That's not what I asked you, Mr. Waterson. I put a
hypothesis to you. Try and remember the hypothesis and
be responsive to it. I'm not interested in an answer
that you have created for yourself a very long time ago
as virtually an answer to all questions. You are in a
courtroom.

THE COURT:

Maître Baker, I don't think it's proper
cross-examination. Put the question to the witness.

Me BAKER:

Could you repeat the question to the witness, please?

REREADING OF THE QUESTION.

A- If there was very little advertising prior to an
advertising ban, then clearly banning it would have,
under any circumstances or set of hypotheses a less
chance of having much success than if there was a great
deal of advertising.

Me BAKER:

Q- Have you ever bothered, in any of your analyses, your trans-national or cross-national analyses or whatever it is you call them, say between Norway and the United Kingdom, to determine whether there was a good deal more advertising in one country and a good deal less advertising in the other?

A- No. The purpose of cross-sectional surveys of the kind that I've undertaken is not to delve deeply into the events that take place in any one country, it's to attempt to draw general conclusions from looking at events in many countries and comparing the results from those many countries.

Q- But I presume you want to be taken seriously, Mr. Waterson, and how can anybody test the accuracy or the usefulness of testimony on the subject if you don't bother to look at the variables -- because without looking at the variables the testimony is of only marginal value, isn't it?

A- In all countries there are many different variables that affect any single variable such as tobacco consumption. It is my belief that it is very difficult to determine whether or not tobacco advertising will have a marked effect because of the many other variables.

To undertake a detailed study of Norway, of the

kind you're suggesting, would require many thousands of man-days and a great deal of effort and time and trouble. And even then, as I explained this morning, would, in my view, be unlikely to come to very precise conclusions. To do it for ten (10) or twenty (20) countries would be a lifetime's study probably, and still not arrive at conclusions that were very much different, I believe, to those from my cross-sectional survey.

5 Q- My cross-sectional survey. Now, what does that mean, "my cross-sectional survey?"

A- From looking at the data as I have looked at it, from looking at the course of tobacco sales in countries with and without a tobacco advertising ban.

15 Q- Well, your cross-sectional survey, let's -- one of those is the data on the United Kingdom, isn't it?

A- It is.

Q- Right. Where you say that advertising expenditure has gone up, consumption has gone -- by seven point five percent (7.5%) -- you say consumption has gone down by twenty-eight percent (28%), I believe?

20

A- That is correct.

Q- From nineteen seventy-five (1975) to date?

A- Yes.

25 Q- Why did you pick nineteen seventy-five (1975) for the

United Kingdom?

A- I picked a number of different examples to demonstrate that over particular periods of time in particular industries, it's possible to show diametrically opposite movements in sales and advertising. I picked the period of nineteen eighty (1980) to nineteen eighty-five (1985) for newspapers because it demonstrated very vividly what I was talking about.

Q- We were talking about nineteen seventy-five (1975), U.K. for tobacco. I'm not interested in newspapers in England, Mr. Waterson.

A- Similarly, similarly I looked at recent years in the U.K. and suggested in my paper that there had been no correlation between advertising expenditure and the movement of sales. Advertising expenditure increases had clearly been unable to stop sales decreases.

Q- Why did you pick nineteen seventy-five (1975)?

A- I have no -- when I -- I did this many months ago probably, I just have no recollection. Presumably because it illustrated my point.

Q- Presumably because it charted the existence of the ban
in Norway?

A- I'm sorry. And, of course, because nineteen seventy-five (1975) happens to be an advertising ban time in Norway.

Q- And that was something you said, if I'm not mistaken,
was a very important milestone in the history of this
very important issue that we're discussing, ad bans and
things like that, the Norway experience is very
5 important; isn't it?

A- The nineteen seventy-five (1975) Norway advertising
expenditure ban has been talked of endlessly for the
last ten (10) years.

17/0239 Q- And, in fact, all of your charts start at nineteen
10 seventy-five (1975), don't they?

A- The charts start in nineteen seventy-five (1975)...

Q- Yes.

A- ...quite deliberately because of the Norwegian
advertising ban.

15 Q- Right. So then you're trying to gauge everything
against Norway, as it were, aren't you?

A- Norway has been the central plank in many of the
arguments put forward in this area and therefore it
seemed to me appropriate to take nineteen seventy-five
20 (1975) as a starting point. There was a second reason,
which is that it is extremely difficult to get
consistent data across many countries going back prior
to nineteen seventy-five (1975). It is very difficult
getting data of a consistent nature anyway, getting it
25 going back a long way before then would, I believe, be

really quite difficult.

Q- Turn to page -- paragraph three (3) of your expert witness report, please.

A- I have it.

5 Q- See the first line,

"...the message may be one that the audience does not want to hear, in which case it will be ignored."

17/0256 A- Yes. I'm sorry, I don't. This is page three (3) of my
10 report.

Me IRVING:

Your report. Paragraph three (3).

A- Paragraph three (3).

Me BAKER:

15 Q- No, paragraph three (3), numbered paragraph three (3).

A- I'm sorry.

Q- Page one (1) of your report.

A- Page one (1). I have it, yes.

Q- You say,

20 "...the message may be one that the audience does not want to hear, in which case it will be ignored."

A- Yes.

Q- What does that mean?

25 A- This means that if you are telling a -- if you are

attempting to tell somebody who drinks very heavily that drinking very heavily may be bad for them, this may be a message that the consumer has already registered and wishes to ignore.

5 Further messages of that sort would, therefore, also be ignored -- they would be shut out from his consciousness or her consciousness.

17/0270 Q- Mr. Waterson, I just put in front of you RJR-24, do you see it?

10 A- I see it, yes.

Q- Do you see, there's a large picture and then there's a white band at the bottom of the advertisement?

A- Yes, I do.

Q- And with print on it.

15 A- Yes.

Q- And what does it say?

A- It says,

"Low tar, as defined by Her Majesty's Government, H. M. Government warning, more than thirty thousand (30,000) people die each year in the U.K. from lung cancer. Health Department's Chief Medical Officers."

20 Q- Well, your statement on paragraph three (3) of your expert's report, does that mean that people don't want to read warnings like that; that they resist them?

25

A- I'm sure that people read the warnings when they first appear. Whether they continue...

Q- That's not what I asked you. I said did they want to?

Me IRVING:

5 Just a minute. Let him finish his answer, please.

Me BAKER:

Q- If I got answers to questions, Mr. Irving, perhaps I wouldn't have to interrupt him persistently.

Me IRVING:

10 You're getting answers to every question you asked, Mr. Baker. If you'd ask clear questions, you might get clear answers. In any event, would you please let the witness answer the question.

A- I think it's unlikely that people continue to read these
15 avidly when they are smokers for the simple reason that if they're continuing to be smokers, they probably don't want to see these messages every day.

Me BAKER:

Q- So they ignore them, they block them out of their heads?

20 A- I have done no research of this kind, but I have looked at some reports in this area and I believe that in general, when people see messages that are dissonant with what they wish to do, with the behaviour patterns they wish to follow, there is a good chance that they
25 will block them out, certainly after they've seen them

for a few times. They also, I'm sure that most smokers actually know that they are running a health risk anyway, because they've been told this on many occasions. So it could also be said to be redundant information, information they have already registered in most cases, and therefore communicating nothing more to them.

Q- Have you done, have you looked at the Canadian situation to determine whether Canadians know a lot about the health risks of smoking?

A- I haven't no.

Q- I see. So your answer, I take it then, is responsible for the citizenry of the United Kingdom only?

A- I think these -- it is generally believed in the advertising world that these kinds of things, the response of people, the dissonance of people to messages they don't want to see, is a fairly general behaviour pattern.

Q- Dissonance of people who don't want to read messages that they read...

A- If you tell...

Q- ...if they don't like the information in the messages?

A- If you're trying to tell the people something unpleasant...

Q- Yes.

- A- ...or something in which they have no interest, then they will probably block it out. There are many thousands and thousands of messages impinging on people every day and as they go about their everyday life and they simply can't pay attention to all of them.
- Q- So then you would agree with me that invariably people simply ignore these health messages on the advertisements?
- A- No, I didn't say that. I said that they may well ignore them after they have registered them and know what they're about. Most smokers know that most cigarette advertisements contain health warnings. They are extremely unlikely, in my view, to read them every time they pass a poster or pick up a pack of cigarettes.
- Q- Do you know why they don't do that?
- A- Because they are dissonant messages, messages they probably don't want to register. They're also messages that they have registered previously, in the vast majority of cases in the U.K., and therefore they're redundant information, information they're already aware of and know about, and have seen.
- Q- Have you done research on dissonant messages?
- A- I have read a number of papers looking at that kind of thing.
- Q- Could you list a few of them for the Court, please?

A- I did a degree in Marketing many years ago and I'm
afraid I have no memory of which ones I read and which
ones I didn't, but these kinds of -- these kinds of
basic marketing theories are taught on every marketing
course, I believe.

Q- Turn to numbered paragraph six (6) of your report.

A- I have it in front of me.

Q- Good. Can you see in the middle the expression "special
promotions"? There is a sentence:

"The price of a product in relation to
competitive products -- the quality of the
product in relation to competitive products is
judged from previous purchases and special
promotional offers are just three (3) obvious
factors which can affect purchase decisions."

A- Yes.

Q- Now, why are special promotions obvious to affect
purchase decisions?

A- If you are, for example, a smoker and someone offers you
the brand of cigarettes which you usually smoke at a
discount, you may buy more of them, you may stock up.
If someone offers a rival brand that you have considered
smoking and somebody offers you a big price reduction,
you may try that cigarette, because it's cheaper.

Q- Can you think of it...

A- The same is true of most -- most shopping behaviour.

Q- Hm, hm. Can you give us any other examples?

A- Well, if you walk around your local High Streets, you will see many shops with -- displaying sale signs.

5 These sale signs are designed to get people to buy from one particular shop or one particular brand of goods rather than from another kind of shop or brand of goods. They are a method of inducing purchasing, attracting purchasers to one particular brand of good or shop rather than another.

10 Q- Turn to paragraph eight (8) of your report, please.

A- I have it in front of me.

Q- Good. I see, you say towards the bottom of that numbered paragraph eight (8):

15 "Then in a stable or declining market, for every winner, there must be a loser."

A- Yes.

Q- Does this statement apply to the present cigarette market in Canada?

20 A- I believe the present cigarette market in Canada is declining and therefore if one brand is gaining share, it is logically impossible for every other brand to gain share. Somebody, somewhere, must be losing out.

Q- Mr. Waterson, do you accept the proposition that a great
25 many smokers switched from high to low tar cigarettes?

A- I believe that has been the case, because there has been a great growth in low tar cigarettes over the past ten (10) years whilst the markets of the western world have been falling.

5 Q- Thank you. And do you accept the proposition that a great many smokers want to quit, try to quit and in fact fail to quit?

A- I have seen opinion surveys suggesting that many smokers do wish to stop smoking.

10 Q- In your scenario of winning and losing which you refer to in paragraph eight (8), when smokers switch from high to low tar, who loses?

15 A- It depends on the brand. If they switch from the brand they are currently smoking to another brand which is low tar, then the current brand is the loser. If they switch to a low tar variety of their current brand, then no one is losing.

Q- Would you say that again?

20 A- If you are smoking currently one particular brand and you switch from a high strength version of it to a low tar version of it, then the company that is marketing that particular brand is losing nothing, unless there are differences in the profitability of those two (2) brands.

25 Q- Hm, hm.

A- If you are induced to smoke a low tar brand which is a different brand from the one you are currently smoking, then the brand you are currently smoking has lost smokers, has lost share.

5 Q- So therefore switching within the same brand family, there is no winner, there is no loser?

A- If that is the only difference that has happened, then there may be differences in profitability between the two (2) brands, but in terms of basic sales, the brand
10 has not lost share, yes.

Q- So, therefore, it is not some kind of inviolable law that even by your definition of a mature market, stable, declining, whatever, that where there is a switch, there is a loser?

15 A- No, I said if within the same brand, people switch from a high tar type of that brand to a low tar. For example, if you were to switch in England from Embassy Normal to Embassy Low Strength or Low Tar -- I'm not a smoker, so I'm not familiar with these terms -- but if
20 you were to switch from one type of Embassy cigarette to another type of Embassy cigarette within the same brand, then there would be no loser because you were switching within the same brand. It simply depends how you define it obviously.

25 If one cigarette, however, one cigarette, one

particular type of cigarette gains share, and let us define all individual brands, so a low tar and a high tar brand that is defined as two (2) separate brands, then if any one brand gains share, it is inevitable in a declining market that another brand must be losing share somewhere.

Q- In your view, Mr. Waterson, is there a difference between attracting a non-smoker to smoke and convincing a concerned smoker to switch to low tar instead of quitting?

A- A difference between inducing a non-smoker to smoke...

Q- Hm, hm.

A- ... and a smoker to change to low...

Q- Convincing a concerned smoker to switch to low tar instead of quitting?

A- I would imagine there was a substantial difference between trying to do those two (2) things.

Q- Aren't you increasing consumption in both cases?

A- Switching a smoker from a high tar to a low tar brand I don't believe to be increasing consumption.

Q- Concerned smokers concerned about their health, rather than quitting, they switch from high tar to low tar.

A- I have no idea about the motivations of individual smokers. I would say...

Q- Have you never looked at the issue of quitting and

smoking?

A- No.

Q- You're not concerned with the issue of quitting and smoking?

5 A- I've only been concerned with researching those aspects of the market that impinge on advertising and I don't believe that has anything to do with advertising.

Q- In your country, there isn't a lot of advertising in respect of low tar cigarettes?

10 A- There is indeed a lot of advertising...

Q- I see.

A- ... in respect to low tar cigarettes.

Q- And do you think that the people in your country who smoke low tar cigarettes are demonstrably different from the people in Canada who smoke low tar cigarettes?

15 A- As a guess, I would suggest no.

Q- You would agree with me, then, that it is very likely, and in fact probable, that both groups of people, both cohorts, as a social scientist would say, are very concerned about their health, no?

20 A- They have certainly been, if they're switching to low tar cigarettes, they may well be doing it in response to the tremendous amounts of government publicity to the effect that they should switch to low tar cigarettes if they wish to keep on smoking.

25

Q- Is there a lot of government publicity in your country?

A- I believe that the Department -- again, I'm not a smoker and I don't register these messages, as perhaps -- but I do believe that the Department of Health in the U.K. has said, or officials of it have said that it is better, if you wish to smoke, to smoke low tar than high tar. I believe that the companies themselves were encouraged to publicize low tar cigarettes and to develop low tar cigarettes at one stage, and also I believe that people such as Sir Richard Doll, who have made statements to the effect that it is "safer" to smoke low tar cigarettes rather than high tar cigarettes.

Q- Ah! Do you remember that statement by Sir Richard Doll, do you? What exactly did he say, and when did he say it?

A- I have a reference to it somewhere. If you'll allow me a moment to find it, I will.

THE COURT:

We will suspend for ten (10) minutes.

SUSPENSION.

Me IRVING:

Mr. Potter asked to be excused, My Lord. He won't be with us for the rest of the afternoon. I understand Mr.

Baker is...

Me BAKER:

Could Mr. Irving and I meet you for just a moment in the
hallway outside, My Lord?

5 THE COURT:

Yes.

SUSPENSION.

10 THE COURT:

On va ajourner à demain matin à dix heures (10:00).

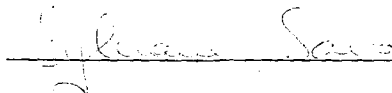
Me BAKER:

Thank you, My Lord.

15 ADJOURNMENT.

I, the undersigned, SYLVIANE SAVO, recording monitor, swear that I have personally conducted the recording of the preceding evidence and representations, verifying continually the quality of said recording, that I have prepared minutes of this hearing with due attention and that in no case was the equipment used defective.

AND I HAVE SIGNED :



SYLVIANE SAVO

I, the undersigned, JANE WEAVER, proof reader, swear that the preceding pages are and contain the faithful and accurate transcription of the English recording.

AND I HAVE SIGNED :



JANE WEAVER